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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. B, *infra*, 3a-28a) is not reported.

JURISDICTION

The district court's order, holding unconstitutional 42 U.S.C. 402(g)(1), was entered on June 23, 1978

(App. B, *infra*, 27a-28a). Notice of appeal to this Court was filed on July 20, 1978 (App. C, *infra*, 29a-30a). On September 12, 1978, Mr. Justice Powell extended the time for docketing the appeal to and including November 17, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTIONS PRESENTED

1. Whether Section 202(g)(1) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by restricting Mother's Insurance Benefits to women who were once married to the deceased wage-earners.

2. Whether the district court properly certified a nationwide class that includes persons not shown to have met the jurisdictional requirements of Section 205(g) of the Social Security Act.

3. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Social Security benefits under a statutory section later held unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 202(g)(1) of the Social Security Act, 42 U.S.C. 402(g)(1), provides in pertinent part:

> The widow and every surviving divorced mother (as defined in section 416(d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
>
> (E) At the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, and
>
> (F) in the case of a surviving divorced mother—
>
> (i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and
>
> (ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income

> shall * * * be entitled to a mother's insurance benefit * * *.

3. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action * * *. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business * * *.

4. Section 216(d)(3) of the Social Security Act, 42 U.S.C. 416(d)(3), provides:

> (3) The term "surviving divorced mother" means a woman divorced from an individual who has died, but only if (A) she is the mother of his son or daughter, (B) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18, (C) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of 18, or (D) she was married to him at the time both of them legally adopted a child under the age of 18.

STATEMENT

Section 202(g) of the Social Security Act provides mother's insurance benefits to the mother of a child of a wage earner who dies fully or currently insured under the Act. To be entitled to benefits, the woman must have been married to the wage earner and must have in her care a child of the deceased wage earner who is entitled to a child's insurance benefit under Section 202(d).[1] The payments are intended to replace the support lost by the wage-earner's death and thus to enable the beneficiary to choose between working and staying at home to care for her entitled child. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); Advisory Council on Social Security, *Reports on the Old-Age, Survivors, and Disability Insurance and Medicare Programs* 30 (1971); *Final Report of the Advisory Council on Social Security* 31 (1938).

Norman W. Boles, an insured wage earner, died on October 10, 1971. His widow, Nancy L. Boles, and their two sons were awarded mother's and children's insurance benefits. On January 15, 1973, Margaret Gonzales, a woman with whom Norman W. Boles had lived from 1963 to 1966 but whom he had never married,[2] filed claims for mother's insurance benefits and, on behalf of her son, Norman J. Boles, for child's insurance benefits. The claim for child's insurance benefits was granted under Section 202(d), but the claim for mother's insurance benefits was denied. App. B, *infra*, 3a-5a. Because Gonzales was never married to Norman W. Boles, she did not meet the requirements for eligibility under Section 202(g)(1).

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[1] The woman also must meet other eligibility requirements not germane to this suit.

[2] Norman W. Boles married Nancy in 1967.

After exhausting her administrative remedies, Gonzales instituted this action in the United States District Court for the Western District of Texas.[3] The district court certified the action as a class action, on behalf of a class consisting of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. § 402(g)(1) restricts such benefits to women who were once married to the fathers of their children" (App. A, *infra*, 1a-2a). The district court then held "that Section 202(g)(1) of the Social Security Act, 42 U.S.C. § 402(g)(1), is unconstitutional and void insofar as it prevents Plaintiffs and the Plaintiff Class from receiving Mother's Insurance Benefits solely on the ground that Plaintiff mothers were never married to the fathers of their children" (App. B, *infra*, 24a).

The court first interpreted *Weinberger* v. *Wiesenfeld, supra*, as holding that mother's insurance benefits are designed to benefit the children of the wage earner; the court then concluded that denying illegitimate children the benefits of mother's insurance discriminates against them in violation of the equal protection principles discussed in *Trimble* v. *Gordon*, 430 U.S. 762 (1977), and *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). The court permanently enjoined the Secretary from denying benefits to the plaintiff class on the basis of the marriage requirement, ordered the Secretary to make payment of mother's insurance benefits to "the named plaintiffs" (Boles and Gonzales) retroactive to the date of Gonzales's claim, and directed the Secretary to notify "all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement * * *" (App. B, *infra*, 24a-25a).

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[3] An identical case was originally filed in the United States District Court for the District of Columbia and transferred to the Western District of Texas. Because of procedural concerns (App. B, *infra*, 6a), this second action was filed. The first case was dismissed after the issuance of the order of the district court in this case.

THE QUESTIONS ARE SUBSTANTIAL

The district court has held that an Act of Congress is unconstitutional. We believe that, in so doing, the court both selected an improper standard of judicial review and misapplied the standard it selected. The questions presented involve substantial sums of money and affect large numbers of persons;[4] review by this Court therefore is appropriate.

1. The Social Security program establishes hundreds of eligibility rules and classifications. Mother's benefits are part of the secondary insurance system

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[4] The Department of Health, Education and Welfare has made a preliminary estimate that the invalidation of the marriage requirement of Section 202(g)(1) would cost at least $60 million annually. Because of the limit on the benefits, invalidation of the marriage requirement also would lead to the reduction of benefits paid to married mothers (see note 11, *infra*).

described in *Califano* v. *Jobst*, 434 U.S. 47, 52-53 (1977):

> The provision challenged in this case is part of a complex statutory scheme designed to administer a trust fund financed, in large part, by taxes levied on the wage earners who are the primary beneficiaries of the fund. The entitlement of any secondary beneficiary is predicated on his or her relationship to a contributing wage earner. If the statutory requirements for eligibility are met, the amount of the benefit is unrelated to the actual need of the beneficiary. The statute is designed to provide the wage earner and the dependent members of his family with protection against the hardship occasioned by his loss of earnings; it is not simply a welfare program generally benefiting needy persons.
>
> Nor has Congress made actual dependency on the wage earner either a sufficient or a necessary condition of eligibility in every case. Instead of requiring individualized proof on a case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency. A child who is married * * * is denied benefits because Congress has assumed that such a child is not normally dependent on his parents. There is no question about the power of Congress to legislate on the basis of such factual assumptions. General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases.
>
> Of course, a general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons. Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character. [Citations and footnotes omitted.]

In this case, as in *Jobst*, the statute makes marriage a pertinent consideration in the determination of eligibility. Here, as there, marriage is relevant to the question of economic dependence on the wage earner. The provision involved in *Jobst* rested on Congress' conclusion that married children are less likely to be economically dependent on their parents than unmarried ones. The provision in this case rests on Congress' conclusion that the mother of a wage-earner's child is more likely to be economically dependent on the wage earner if she is, or has been, married to him. A classification on the basis of either assumption will doubtless inaccurately reflect actual economic dependence in some cases, but it is nevertheless a rational general rule for allocating benefits.[5]

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[5] This Court has upheld similar general rules in the Social Security Act relating to marital status. *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Mathews* v. *De Castro*, 429 U.S. 181 (1976). In *Salfi* the Court concluded that there was no constitutional bar to the disqualification of the wage-earner's widow from the receipt of mother's benefits because she failed to meet the statutory requirement of marriage to the wage

The district court held, however, that some enhanced scrutiny of the marriage requirement here is required because the children of unmarried persons are illegitimate, and the statute, by denying benefits to mothers, reduces the funds available for mothers' care of children and thus discriminates against the illegitimate children (App. B, *infra*, 8a-13a). It then concluded that the classification could not withstand the enhanced scrutiny that should be applied to discrimination against illegitimate children. The court's analysis rests on its reading of *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). The district court concluded that *Wiesenfeld* holds that mother's insurance benefits are "really" for the child (App. B, *infra*, 7a, 13a), so that the child may receive the care of his surviving parent. Under this view, the denial of mother's benefits should be treated exactly as if the child had been denied benefits on the basis of illegitimacy.

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earner at least nine months before his death. In *De Castro* the Court sustained the statutory denial of mother's benefits to divorced wives under age 62 of living wage earners, although both the wives of such wage earners and the divorced wives of deceased wage earners are eligible for such benefits regardless of their age. In both *Salfi* and *De Castro* the Court recognized that it is not a constitutional requirement that the statutory classification "precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute." 422 U.S. at 777; 429 U.S. at 189. See also *Zablocki* v. *Redhail*, 434 U.S. 374, 403 (1978) (Stevens, J., concurring), noting that "[c]lassification based on marital status has been an accepted characteristic of tax legislation, Selective Service rules, and Social Security regulations."

The district court has misunderstood both this Court's opinion and the statute. The benefits are not supplementary children's benefits, intended to contribute additional child support. They are mother's benefits, designed to replace the support she lost by the wage-earner's death, and thus to give her the option to stay home to care for their children (420 U.S. at 648, 651).[6] Children have a separate entitlement to benefits.[7] Nothing requires a mother to use the mother's benefits in any particular way, and a mother's decision to continue working rather than to receive benefits does not affect the child's entitlement.

Wiesenfeld held that there is no rational basis for providing to a widow, but not to a widower, the option to stay home to care for a child (*id.* at 651). But *Wiesenfeld* does not suggest that such an option must, as a matter of constitutional necessity, also be offered to a surviving parent who has never been married to the wage earner.[8] That is the question involved here. The district court simply avoided that question by defining the mother's benefit as intended for the child.[9]

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[6] The Court in *Wiesenfeld* rejected the argument that the mother's benefit is designed to recognize the particular economic difficulties facing a woman seeking to support her family (*id.* at 648). The district court's interpretation of the mother's benefit as supplementary income to the child in a household headed by a single woman is analogous to that rejected argument.

[7] Norman J. Boles, the illegitimate child of Gonzales and Norman W. Boles, is entitled to and is receiving child's insurance benefits.

[8] The denial of such an option to an unmarried parent does not have the defect, condemned in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-176 (1972), of imposing legal burdens on the child for the actions of his parents. See also *Jimenez* v. *Weinberger*, 417 U.S. 628, 632 (1974).

It is true, as the district court observed, that Congress has gradually expanded the category of spouses to whom the option to stay at home is made available (App. B, *infra*, 10a-13a). But this does not indicate that Congress has abandoned the principle that the death of the wage earner is more likely to result in a loss of support to his widow or former wife than to someone to whom he was never married. Nor does the fact that Congress has taken steps to meet the needs of certain categories of mothers require it also to extend benefits to mothers in appellee Gonzales's class. See *Califano* v. *Jobst*, *supra*, 434 U.S. at 57-58. Indeed, because the statute limits the total amount of monthly benefits payable on any wage-earner's account (42 U.S.C. 403a, 415),[10] judicial extension of the class of qualified mothers may mean that the

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[9] The district court is wrong in concluding (App. B, *infra*, 22a-23a) that no legitimate children are affected by the marriage requirement of Section 202(g)(1).

A woman who has never married the wage-earner may not receive mother's benefits, even though her children by the wage earner have been legitimated by operation of state law, or she is caring for the wage-earner's children born in wedlock. Conversely, the statute provides that the wage-earner's widow with an entitled child in her care is entitled to mother's benefits (42 U.S.C. 402(g)(1)). That entitled child may be an illegitimate child of the wage earner. The case thus does not entail discrimination against illegitimate children even given the district court's view of the purpose of mother's benefits.

[10] See also Pub. L. No. 95-216, Section 202, 91 Stat. 1524.

mother's benefit will be unable to serve its primary function—providing sufficient support to permit the surviving parent to forego outside employment.[11] It is essential to the success of the legislative scheme to permit Congress to balance the desirability of extending the class of eligible mothers against the need to provide adequate payments to achieve the statutory purpose, while conserving the limited resources of the trust fund. The district court's decision upsets the legislative balance.

Moreover, even if the denial of mother's benefits to persons who have never been married to the wage earner were a classification based on illegitimacy, it would not be unconstitutional. This Court has consistently rejected arguments that such classifications are suspect. See *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976); *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977). And it has cited *Lucas*, a case involving a classification based on illegitimacy, as establishing the proper standard of review in a case involving an entirely neutral type of classification under the Social Security Act. *Mathews* v. *De Castro*, *supra*, 429 U.S. at 185. The statute here is supported by a strong rationale, and, given its relatively indirect effect on illegitimates, the statutory classification is consistent with due process under whatever level of scrutiny is appropriate.

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[11] The effect of such an extension is illustrated by the facts of this case. Based on Norman W. Boles' earnings record (Tr. 44), the maximum amount payable on his account since June 1978 has been $322.00 each month. Without the payment of benefits to appellee Gonzales, each of the secondary beneficiaries receives $80.50, making a total monthly payment to the three members of Nancy Boles's household of $241.50, and $80.50 to Norman J. Boles. If Gonzales were also to be paid out of this maximum, the total payments to each of the other beneficiaries would be reduced by 20%, so that Nancy Boles's household would receive $193.20, and the Gonzales household would get $128.80. Although the increase in income to the Gonzales household would hardly be enough to permit Gonzales to subsist without other sources of income, the decrease in the Boles household's income might well require Nancy Boles to find employment.

2. The district court erred in certifying this suit as a nationwide class action and in entering an injunction. Here, as in *Califano* v. *Elliott*, cert. granted, No. 77-1511 (Oct. 2, 1978), class relief is inconsistent with 42 U.S.C. 405(g), the exclusive jurisdictional basis for claims arising under the Social Security Act (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757), for three reasons. First, relief was granted to persons who were not before the court. Second, the class included persons who have not filed any claim with the Secretary and therefore have not met the jurisdictional requirement of 42 U.S.C. 405(g). Third, the class was nationwide. The arguments we have made in *Elliott* are pertinent here as well.

3. The district court also erred in awarding retroactive benefits to Gonzales. As we contend at pages 28-31 of our brief in *Califano* v. *Aznavorian*, Nos. 77-991 and 77-5999, argued Nov. 6, 1978, Congress has not waived the government's sovereign immunity

for damages suits based on the unconstitutionality of provisions of the Social Security Act.[12]

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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November 1978

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[12] We will send a copy of our brief in *Elliott* to counsel for appellees as soon as the brief is filed. We have furnished them with a copy of our brief in *Aznavorian*.

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed June 22, 1978, By William Putnicki, Clerk;
By Wanda Peterson, Deputy Clerk]

Civil Action No. A-77-CA-104

NORMAN J. BOLES, MARGARET GONZALES,
on behalf of themselves and all those
similarly situated, PLAINTIFFS,

v.

JOSEPH CALIFANO, Secretary,
United States Department of
Health, Education and Welfare, DEFENDANT.

ORDER

Upon consideration of the motion of Plaintiffs Norman J. Boles and Margaret Gonzales for certification of this action as a class action, it is, by the Court, this 22nd day of June, 1978.

ORDERED that the motion of Plaintiffs is hereby granted; and it is further

ORDERED that this action is certified, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, as a class action on behalf of a class consisting of all illegitimate children and their mothers who are presently ineligible for Mother's

Insurance Benefits solely because 42 U.S.C. § 402 (g)(1) restricts such benefits to women who were once married to the fathers of their children.

/s/ Jack Roberts
JACK ROBERTS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed June 23, 1978, By William Putnicki, Clerk;
By Wanda Peterson, Deputy Clerk]

CIVIL ACTION NO. A-77-CA-104

NORMAN J. BOLES, MARGARET GONZALES,
on behalf of themselves and all those
similarly situated

v.

JOSEPH CALIFANO

MEMORANDUM OPINION AND ORDER

This action has been brought by the plaintiffs, Margaret Gonzales and her son, Norman J. Boles, who seek Mother's Insurance Benefits pursuant to section 202(g) of the Social Security Act, 42 U.S.C. § 402(g). The plaintiff Gonzales is not the widow of the deceased wage earner, who died a fully insured individual for purposes of collecting old-age insurance benefits. The plaintiff son is the illegitimate child of the wage earner and he is presently receiving Child's Insurance Benefits under 42 U.S.C. § 402(d) on the account of his father. Plaintiffs challenge the constitutionality of Section 202(g)(1) of the Act, as amended, 42 U.S.C. § 402(g)(1), which precludes entitlement to benefits to the mother of a child of a fully insured wage earner who never married that wage earner. Plaintiffs claim that the purpose behind the enactment of 42 U.S.C. § 402(g)(1) was the protection and care of minor children, and that by paying benefits to a mother with minor children in her care, the resulting benefit would in fact inure to the minor child. Therefore, if the mothers of illegitimate children are not permitted to obtain mother's insurance benefits, the result is not only a loss for them but a loss of benefits to illegitimate children solely because of their illegitimacy. Defendant, on the other hand, argues that the benefit is for the mother, and that the plaintiff child was not denied this benefit because of his illegitimate birth, but because his mother failed to qualify for such entitlement under valid statutory criteria. This Court believes Plaintiffs' characterization of the case is the more apt one and aligns itself with that line of cases which has overturned enactments which unfairly discriminate against children solely on the basis of their illegitimacy.

I. Statement of Facts

The determinative facts in this case are not in dispute; most of them appear in the administrative record filed as part of this case. The plaintiff, Margaret Gonzales, and the deceased wage earner, Norman W. Boles, though never married, lived together in Georgetown, Texas, continuously from February 1963 until sometime in 1966. As a result of this relationship, Norman J. Boles, the plaintiff, was born on October 29, 1964.

Norman W. Boles returned to Wilson County, Tennessee and married Nancy L. Boles in April 1967. The two lived together until the wage earner's death on October 10, 1971. During their marriage they had two sons, Johnny W. Boles, born on January 12, 1969, and Jessie R. Boles, born March 8, 1970. Nancy L. Boles applied for and was found entitled to, on her own behalf and on behalf of her two sons, mother's insurance benefits and children's insurance benefits under the account of Norman W. Boles. She and her sons began receiving those benefits in December 1971, effective from September 1971.

On January 15, 1973, Margaret Gonzales made application on her own behalf and on behalf of Norman J. Boles for mother's insurance benefits and child's insurance benefits under the account of Norman W. Boles. Both applications were denied initially on April 13, 1973. On January 24, 1974, Margaret Gonzales' application was denied following a reconsideration determination. However, subsequent to a reconsideration determination, the application for child's insurance benefits on behalf of Norman J. Boles, who had been acknowledged in writing by the wage earner, had been approved. In April 1974, the monthly benefits payable to Nancy L., Johnny W., and Jessie R. Boles were reduced, effective from January 1973, to compensate for the addition of Norman J. Boles to the account of Norman W. Boles. This reduction was required to keep the account within the family maximum as allowed under section 215 of the Social Security Act, 42 U.S.C. § 415. On November 15, 1974, an administrative law judge of the Bureau of Hearings and Appeals affirmed the decision denying mother's insurance benefits to Ms. Gonzales on the basis that she and the deceased wage earner had never been married. Review of that decision by the Appeals Council of the Bureau of Hearings and Appeals was requested by Ms. Gonzales on November 19, 1974.

On November 27, 1974, Plaintiffs filed an action in the United States District Court for the District of Columbia in which they sought convocation of a three-judge district court pursuant to the then-current version of 28 U.S.C. § 2282. That Court, on September 15, 1975, ordered a change of venue to the United States District Court for the Western District of Texas. In Texas, Judge John R. Brown, on November 10, 1975, issued an order designating a three-judge court. The three-judge court action has been pending on the docket of this court as Civil Action No. A-75-CA-171. On April 13, 1977, the Appeals Council of the Bureau of Hearings and Appeals denied Plaintiffs' claim. On June 10, 1977, Plaintiffs filed the instant action, apparently fearing that there might be a jurisdictional defect in the three-judge court action. Cross-motions for summary judgment have been filed in the case.

II. Preface to Legal Argument

The program of Social Security benefits for children of deceased wage earners includes Children's Insurance Benefits and Mother's Insurance Benefits. As the Court examines in more detail later, Mother's Insurance Benefits were intended as a benefit to the child. The Supreme Court expressly so held in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), stating for example, that "§ 402(g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since mother's benefits are linked to children's benefits only so long as it is realistic to think that the children might need the parent at home." 420 U.S. at 650, n.17. The legislative history also establishes that the purpose is to benefit the child. *See infra.*

In a line of twelve cases since 1968, the Supreme Court has repeatedly declared unconstitutional discrimination against illegitimate children and their mothers, particularly in cases involving social welfare benefits. The most recent case is *Trimble* v. *Gordon*, 430 U.S. 762 (1977), prohibiting discrimination against illegitimate children under interstate inheritance laws. The *Trimble* decision lists the eleven earlier cases. *See* 430 U.S. at 766, n.11.

Ten of the cases overturned discrimination against illegitimates. Only two of the twelve cases upheld any form of disparate treatment of illegitimate children. Those two cases were *Labine* v. *Vincent*, 401 U.S. 532 (1971) and *Mathews* v. *Lucas*, 427 U.S. 495 (1976). *Labine* has been in essence overruled, or at least limited to its facts, by *Trimble* v. *Gordon*. *See* 430 U.S. at 767-68, n.12 and 776, n.17. *Mathews* has for all practical purposes been rendered moot by *Trimble*. *See infra.*

Four of the twelve cases expressly held unconstitutional discrimination against illegitimates in Social

Security benefits. *See infra.* They require, in the Court's view, a similar holding here, where all illegitimate children are denied the benefits of Mother's Insurance Benefits while all legitimate children receive them, without regard in either case to whether the deceased father had even lived with or supported the children.

III. Mother's Insurance Benefits Are Intended as Benefits to the Child

The statute challenged herein, 42 U.S.C. § 402(g)(1), provides Mother's Insurance Benefits to allow the surviving child of a deceased worker to receive the care of its surviving parent, relieving at least to some extent the necessity of the surviving parent to leave the child and go to work. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). The three principal eligibility requirements for Mother's Insurance Benefits, so far as this case is concerned, are:

1) that the child be eligible for or receiving Children's Insurance Benefits;

2) that the child be in the care of its mother; and

3) that the mother of the child had been married to the deceased father, either at the time of his death or by an earlier marriage followed by a divorce.

The first two requirements have been met herein. Plaintiff Norman Boles is receiving Children's Insurance Benefits and is in the care of his mother, Plaintiff Gonzales. The third requirement, marriage of the mother to the father, deprives plaintiff Boles and all

other illegitimate children of the benefits of Mother's Insurance Benefits.

In *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), the Supreme Court unanimously held that Mother's Insurance Benefits are for the benefit of the child. The Court stated at 420 U.S. at 648-49:

> ". . . § 402(g), linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. . . .
>
> "That the purpose behind § 402(g) is to provide children deprived of one parent with the opportunity for the personal attention of the other could not be more clear in the legislative history."

The Court went on to explain that "The whole structure of survivors' benefits conforms to this articulated purpose [care of children]." 420 U.S. at 650. It noted that widows without children obtain no benefits on the basis of their husband's earnings until they reach age 60, in most instances. Mother's Benefits cease when the child is no longer eligible for Child's Benefits or when the mother no longer has the child in her care or custody. Mother's Benefits also cease when the child reaches 18, even though Children's Benefits may continue until age 22. The Court noted that "This distinction also sustains our conclusion that § 402(g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since mother's benefits are linked to children's benefits only so long as it is realistic to think that the children might need the parent at home." 420 U.S. at 651, n.17.

Defendant attempts to distinguish *Wiesenfeld* on some vague ground that it involved a "family unit" which suddenly lost its wage earner, or that the marriage requirement is tied to an obligation of support. This contention ignores that statute in its present form and its legislative history. It is an argument based on a much different statutory provision for Mother's Benefits which Congress adopted in 1939 when it first provided for survivor's benefits, but which is inapposite today. Under the 1939 provisions, Mother's Benefits were provided only for widows who were actually living with the deceased worker at the time of his death. Act of August 10, 1939, 53 Stat. 1362, 1365 (76th Cong., 1st Sess.). But the "living with" requirement has been completely eliminated in the statute and there is no requirement that the deceased worker have ever been living with or supporting his wife or children. The legitimate children of the deceased wage earner, Mr. Boles, will receive the benefits of Mother's Insurance Benefits regardless of whether their father was living with them or supporting them at the time of his death, or even if he never lived with or supported them. In contrast, if Mr. Boles had left his wife and returned to live with plaintiffs Gonzales and Boles and died while living with and supporting them, they would still remain ineligible for Mother's Insurance Benefits. In other words, it is the illegitimacy of the child and not any notions of "family unit" which unconstitutionally denies benefits to plaintiffs and the members of plaintiffs' class. *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee and Life Insurance Company*, 391 U.S. 73 (1968).

Another illustration that Mother's Benefits are unrelated to an existing family unit is the statutory changes which now provide such benefits to divorced mothers and their children. At its inception the Mother's Benefit was limited to widows and was even called "Widow's Current Benefits." This title was changed to Mother's Benefits in the 1950 amendment which gave Mother's Benefits to surviving divorced wives and their children. Act of Aug. 28, 1950, 64 Stat. 482, 485. This change alone dispels the defendant's argument that survivor's benefits are currently intended to protect against the vulnerability of the family unit, because we are now granting benefits to homes which had already been broken up as a family unit by divorce.

The current statutory scheme also contradicts defendant's emphasis on legally enforceable support obligations. For example, defendant argues that a divorced woman has a means by which she can compel support for herself and her children from her former husband. On the contrary, divorced mothers and their children are eligible for Mother's Benefits even if no legal obligation to support existed at the time of the wage earner's death, or at any time after the divorce. Prior to 1965, if the mother divorced the father and remarried, she lost eligibility for Mother's Benefits for all time due to her remarriage.

But since the 1965 amendment, if the mother's second marriage is terminated by divorce or death of her second husband, she may be eligible for Mother's Benefits on the account of her first husband (assuming all other requirements are met) because she "is not married" after termination of her second marriage. This is so even though any support obligation of her first husband most probably terminated at the time of her remarriage. All this demonstrates that Mother's Benefits are not related to an obligation to support the mother but rather stem from the statutory purpose to assist the children.

The provisions for Mother's Benefits to surviving divorced wives also illustrates in another way that the statute currently has no relationship to support requirements. In an earlier form, a surviving widow was entitled to benefits only if she were receiving at least half of her support from the former husband at the time of his death. Act of Aug. 10, 1950, 64 Stat. 482,485. That requirement no longer applies. P.L. 89-97, § 307(c)(3-5); 79 Stat. 286, 378 (1965). Now the divorced wife is eligible for Mother's Benefits even if she has never received any support from the father either for herself or for her children, even if the father was excused from any support obligations in the divorce proceedings. Thus such women and their children are eligible for Mother's Benefits even though no legal obligation to support the ex-wife exists at the time of the death of the father.

Where the statute discriminates against illegitimate children, an analysis must be made of the purposes of the statutory scheme and the purposes for the disparate treatment. As the Supreme Court demonstrated in both *Jimenez* v. *Weinberger*, 417 U.S. 636 (1974) and *Trimble* v. *Gordon*, 430 U.S. 762 (1977), such an analysis looks to the reality of the statutory scheme and does not accept glib statements of its purpose by its defenders. Such an analysis herein demonstrates that the only reason plaintiffs have been denied Mother's Insurance Benefits is the illegitimacy of plaintiff Boles resulting from the failure of his mother and father to marry. It is the classic case of visting the sins of the parents on the child. As the Supreme Court pointed out in its most recent decision on point, "the parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status. *Trimble* v. *Gordon*, 430 U.S. at 770.

IV. Discrimination in the Social Security Act Against Illegitimate Children in Providing Mother's Insurance Benefits Violates the Fifth Amendment

The Supreme Court has made it clear that it is unconstitutional to deny illegitimate children benefits enjoyed by legitimate children solely because of the status of their birth. In *Weber* v. *Aetna Casualty and Surety Company*, 406 U.S. 164 (1972), the Court found it unconstitutional to deny the same right of recovery of workmen's compensation benefits to illegitimate children of deceased workers as was enjoyed by legitimate children of deceased workers. Relying on its prior decision in *Levy* v. *Louisiana*, 391 U.S. 68 (1968), involving recovery under a wrongful death statute, the Court concluded:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing difficulties on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise."

Weber v. *Aetna Casualty and Surety Co.*, 406 U.S. at 175-76.

In subsequent social welfare cases the Court has relied on this principle to reject disparate treatment of illegitimate children. In *Gomez* v. *Perez*, 409 U.S. 535 (1973), the Court held that:

> ". . . a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."

Id., 409 U.S. at 538. Again in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), the Court found unconstitutional a provision of the Social Security Act regarding Children's Benefits which discriminated against illegitimate children born after the onset of the wage earner's disability. It reiterated its position that discrimination based on status of birth was unconstitutional. *Id.*, 417 U.S. at 632. *Accord: Beaty* v. *Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd summarily*, 418 U.S. 901 (1974).

The Supreme Court has also summarily affirmed two lower court decisions invalidating a provision of the Social Security Act under which certain classes of illegitimate children could receive Children's Benefits only if other survivors of the deceased did not exhaust the Act's maximum family allowance. *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

In *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973), the Court struck down a provision of New Jersey's program of "Assistance to Families of the Working Poor." The plaintiffs challenged an aspect of the program which limited benefits to families with two ceremonially married adults and at least one minor child of both. The

Court, quoting *Weber* and relying as well on *Levy* and *Gomez*, sustained the constitutional objection, concluding that:

> ". . . appellants' claim of the denial of equal protection must be sustained, for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate."

Id., 411 U.S. at 621.

In its most recent case in point, involving intestate inheritance, the Supreme Court held that "the statutory discrimination against illegitimate children is unconstitutional. . . ." *Trimble* v. *Gordon*, 430 U.S. 762, 766 (1977). The case in effect overruled *Labine* v. *Vincent*, 401 U.S. 532 (1974), which itself was one of only two cases decided since 1968 upholding unequal treatment of illegitimates. See 430 U.S. at 776, n.17. In *Trimble* the Court noted that Labine is "difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent." 430 U.S. at 767-68, n.12.

Trimble has also rendered moot the only other case since 1968 upholding disparate treatment of illegitimates. That case, *Mathews* v. *Lucas*, 427 U.S. 495 (1976), involved Children's Insurance Benefits under the Social Security Act. In one part the Act requires a child to be dependent upon his insured parent to qualify for the benefits, 42 U.S.C. § 402(d)(1)(C), but then concludes that an extensive list of categories

of children are presumptively dependent, including all legitimate children and many classes of illegitimate offspring. As the Court notes, ". . . a child who would be entitled to inherit personal property from the insured parent's estate under the applicable state intestacy law, is considered to have been dependent at the time of the parent's death." *Id.*, 427 U.S. at 499. *See also Jimenez* v. *Weinberger*, 417 U.S. 628, 631 n.2 (1974). Since *Trimble* requires that all illegitimate children may now inherit upon intestacy (with the possible exception of residents of Louisiana), *Lucas* is effectively moot and no illegitimates will have to prove dependency in order to qualify for Children's Benefits. The discrimination against illegitimate children and their mother in the provision of Mother's Insurance Benefits is thus apparently the sole remaining vestige of a variety of discriminatory provisions against illegitimates in the Social Security Act which have fallen under the recent decisions of the United States Supreme Court.

In any event *Lucas* does not apply to the case at bar which involves an exclusion of all illegitimates without any opportunity to prove dependency and the inclusion of all legitimates without regard to dependency. In this regard, *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974) and *Beaty* v. *Weinberger*, 478 F.2d 300 (5th Cir. 1973), *summarily aff'd*, 418 U.S. 901 (1974), are more nearly controlling. Both cases involved the situation of children of a disabled insured worker born after the onset of the disability. Afterborn legitimate children and some classes of after-born illegitimate children receive Children's Insurance Benefits, but other after-born illegitimate were barred from benefits, regardless of whether they were living with or were dependent on the insured. The Court found that the statute was both overinclusive by granting benefits to children not dependent on the insured and underinclusive by denying benefits to children who were actually dependent on the insured. It concluded, in *Jimenez*, at 417 U.S. at 637:

> ". . . hence to conclusively deny one subclass benefits presumptively available to the other denies the former equal protection of the laws guaranteed by the due process provision of the Fifth Amendment."

The case at bar is even a stronger example of an unconstitutional statute because it encompasses a total exclusion of all illegitimates from Mother's Insurance Benefits and a total inclusion of all legitimate children, regardless of dependency. In both *Jimenez* and *Beaty*, the discrimination was actually between classes of illegitimates on one hand and a class made up of both legitimates and illegitimates on the other. Nevertheless the Court struck down the absolute bar to benefits.

In contrast, *Mathews* v. *Lucas*, 427 U.S. 495 (1976), involved only overinclusion, not underinclusion. Unlike here, the disfavored class in *Lucas* had the opportunity to qualify for benefits by proving dependency. Indeed, defendant's scant reference to the *Lucas* case in his memorandum indicates recognition of its inapplicability.

Instead, defendant relies on two Social Security cases which do not involve discrimination against illegitimate children at all. *Califano* v. *Jobst*, —— U.S. ——, 98 S.Ct. 95 (1977); *Mathews* v. *deCastro*, 429 U.S. 181 (1976). The Court recognizes that in cases such as these the rule of *Dandridge* v. *Williams*, 397 U.S. 471 (1970), applies so that the statute may draw distinctions in granting social welfare benefits so long as they have a rational basis, even though the classification is not mathematically precise or results in some inequality. *Mathews* v. *deCastro*, 429 U.S. at 185. But the cases also acknowledge that distinctions based on sex and illegitimacy aren't treated in quite the same fashion.

Although the strict scrutiny applicable to race discrimination is not applicable to illegitimates, *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976), the Supreme Court has indicated that the courts must look more closely to analyze the statutory purpose and the rationality of the means sought to achieve it when discrimination against illegitimates results. In *Trimble* v. *Gordon*, 430 U.S. 762 (1977), the Court noted that although the strict scrutiny test is not applicable to illegitimacy cases, it recognized that illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis for statutory differentiation. The Court then concluded:

> "Despite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," *Lucas* also establishes that

> the scrutiny "is not a toothless one," . . . a proposition clearly demonstrated by our previous decisions in this area."

Id., 430 U.S. at 767.

The approach which the Court took to the Illinois intestacy statute is illustrative of the required constitutional review in cases involving discrimination against illegitimates. A variety of rationales were offered by the state to support its denial of intestate inheritance from the father to his illegitimate children. The Court sifted through the rationales, rejecting some as not expressing the purpose of the Illinois legislature in enacting the statute. As to others, it decided the means used by the state to achieve the purpose was unconstitutionally broad. It noted that the statute did not meet the test that was central to the finding of constitutionality in *Mathews* v. *Lucas*, 427 U.S. 495 (1976), that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Trimble* v. *Gordon*, 430 U.S. at 772.

The Court has followed this pattern of careful evaluation of the statutory purposes in all of its illegitimacy cases in the past ten years. In *Levy* v. *Louisiana*, 391 U.S. 68 (1968) and *Glona* v. *American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968), arguments that denial of wrongful death benefits to illegitimates and their mother would discourage immorality and illegitimacy were examined and found constitutionally insufficient to justify the

discrimination. A similar analysis overturned discrimination against illegitimates in workers' compensation benefits against an argument that giving preference to legitimate children strengthens family ties and comports with the norm of closer family relationships between a father and his legitimate children. *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972). In *Gomez* v. *Perez*, 409 U.S. 535 (1973), the Court rejected the "lurking problems of proof of paternity" as justification for denying an illegitimate child the right to receive support from its father. The Court noted that under *Levy* and *Weber* "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Id.*, 409 U.S. at 538.

In *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973), the Court overturned a state public assistance program limited to families in which the mother and father are married against a claim that the statute was designed to preserve and strengthen traditional family life. The Court noted that "the benefits extended under the challenged program are as indispensable to the health and wellbeing of illegitimate children as to those who are legitimate." *Id.*, 411 U.S. at 621. In *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), discrimination against a class of illegitimates in Social Security benefits was held unconstitutional despite a strong argument that the differential treatment was necessary to prevent spurious claims of paternity. In contrast to the decisions in cases not involving illegitimates or sex, Chief

Justice Burger's opinion for the Court closely examines the problem of spurious claims and finds they could be met without a blanket exclusion of a class of illegitimate children.

Thus none of these discredited rationales can be used to uphold the discriminatory treatment accorded illegitimates in this case. The Court, moreover, has already examined and discredited the government's arguments that this discrimination is justifiable because of considerations of the "family unit" or because legal support obligations are involved.

The suggestion of defendant that the case does not involve discrimination against illegitimates since benefits were denied plaintiff because his mother failed to qualify because she was never married to his father is sheer sophistry. Lack of marriage between the mother and father of a child is the very definition of illegitimacy. Defendant's argument was rejected by the Supreme Court in *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973) which held unconstitutional a New Jersey statute granting public assistance for families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child. . . ." 411 U.S. at 619. The Supreme Court took little space to brand this "neutral" language as nothing more than invidious discrimination against illegitimates. As the Court there recognized, ". . . although the challenged classification turns upon the marital status of the parents as well as upon the parent-child relationship, in practical effect it operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate." 411 U.S. at 619.

Under the defendant's argument, all Illinois has to do is to amend its statute to provide that intestate inheritance from the father is granted only to a child "whose mother was married to his father" and the result in *Trimble* would be overturned. Illegitimate children would not inherit, but defendant would describe the result as constitutional because the statute was now facially neutral.

Defendant has also attempted to play on the sympathy of the Court by suggesting that any increase in benefits to plaintiffs may entail a reduction in benefits to the deceased's legitimate children, due to the maximum of benefits payable on the account of one insured. Why this Court should favor the legitimate child over the illegitimate child is not explained. In any event, *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972); and *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972) expressly reject such contention on the part of defendant.

The reality of the history of the Social Security Act is that the Act discriminated against illegitimate children because of the stigma of their birth, the very kind of legislation the Supreme Court has consistently condemned since 1968. Until 1965, twenty-six years after Children's Benefits were first instituted, the Social Security Act gave no benefits to illegitimate children. *See Davis* v. *Richardson*, 342 F. Supp. 588, 591 (D. Conn.), *summarily aff'd*, 409 U.S. 1069 (1972). Then Congress included illegitimate children but hedged their benefits with a series of discriminatory provisions, almost all of which have been struck down by the Supreme Court. The last vestige of this discrimination now appears to be before this Court, and the Court is of the opinion that it should suffer the same fate. Illegitimate children have an equal need and an equal right with legitimate children for the opportunity to have their mothers stay home to care for them when they are young.

It is accordingly

ORDERED that Defendant's motion for summary judgment is DENIED;

ORDERED that Plaintiff's motion for summary judgment is GRANTED;

DECLARED that Section 202(g)(1) of the Social Security Act, 42 U.S.C. § 402(g)(1), is unconstitutional and void insofar as it prevents Plaintiffs and the Plaintiff Class from receiving Mother's Insurance Benefits solely on the ground that Plaintiff mothers were never married to the fathers of their children;

ORDERED that the Defendant is permanently enjoined from denying benefits to Plaintiffs and the Plaintiff Class on the basis of the marriage requirement declared unconstitutional herein;

ORDERED that the Defendant make payment of Mother's Insurance Benefits to the named Plaintiffs retroactive to January 15, 1973; and

ORDERED that the Defendant notify all illlegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits.

Entered this 23 day of June 1978, at Austin, Texas.

/s/ Jack Roberts
JACK ROBERTS
United States District Judge

A true copy of the original, I certify.

DAN W. BENEDICT
Clerk

By: /s/ [Illegible]
Deputy

APPENDIX

Statutory Scheme

Section 202(g) of the Social Security Act, 42 U.S.C. § 402(g) provides in part:

> "(g)(1) The widow and every surviving divorced mother (as defined in section 216(d) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefits,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
>
> (E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, and
>
> (F) in the case of a surviving divorced mother—
>
> > (i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and
> >
> > (ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,
>
> shall (subject to subsection (s)) be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: No child of such deceased individual is entitled to a child's insurance benefit, such widow or surviving divorced mother becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widower's insurance benefit, she remarries, or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced mother, with the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced mother is entitled to a child's insurance benefit on the basis of the wages in self-employment income of such deceased individual.
>
> (2) Such mother's insurance benefits for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

* * * * *

Section 216(c) of the Act, 42 U.S.C. § 416(c) provides in part:

> "(c) The term "widow" * * * means the surviving wife of an individual * * *.

Section 216 (h)(1)(A) of the Act, 42 U.S.C. section 416(h)(1)(A) provides in part:

> "(h)(1)(A) An applicant is the * * * widow * * * of a fully or currently insured individual for purposes of this subchapter * * * if such insured individual is dead, the courts of the State in which he was domiciled at the time of death * * * would find that such applicant and such insured individual were validly married * * * at the time he died. If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless, be deemed to be the * * * widow * * * of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a * * * widow * * * of such insured individual.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

[Filed July 20, 1978]

Civil Action No. A-77-CA-104

NORMAN J. BOLES, ET AL.

vs.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252 and 2101, and from the Memorandum Opinion and Order entered by the United States District Court for the Western District of Texas on June 23, 1978.

JOSEPH A. CALIFANO, JR.
Secretary of the Department
of Health, Education &
Welfare, Defendant

MORTON HOLLANDER
Chief, Appellate Section
Civil Division
Department of Justice
Washington, D. C. 20530

Jamie C. Boyd
United States Attorney

By: /s/ Hugh P. Shovlin
Hugh P. Shovlin
Assistant U. S. Attorney

A true copy of the original, I certify.

Dan W. Benedict
Clerk

By: /s/ Wanda Peterson
Deputy

☆ U. S. GOVERNMENT PRINTING OFFICE; 1978 277079 187

A MOTION TO DISPENSE
WITH THE PRINTING
OF THE APPENDIX
WAS MADE AND GRANTED.

Supreme Court, U.S.
FILED
[illegible]
MICHAEL RODAK, JR., CLERK

Supreme Court, U.S.
FILED
DEC 27 1978
MICHAEL RODAK, JR., CLERK

No. 78-808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF APPELLEES TO AFFIRM OR ALTERNATIVELY TO DISMISS THE APPEAL

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2A Moore, Federal Practice § 8.27(3), p. 1853 (2d ed. 1975) 27

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No. 78-808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF APPELLEES TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT AND TO DISMISS THE APPEAL AS TO QUESTION 3 OF THE JURISDICTIONAL STATEMENT

Appellees Norman J. Boles and Margaret Gonzalez, individually and on behalf of the plaintiff class, move that the judgment of the District Court be affirmed, and alternatively that the appeal be dismissed as to Question 3 of the Jurisdictional Statement.

OPINION BELOW

The opinion of the District Court is unreported and is set forth as Appendix B to the Jurisdictional Statement.

JURISDICTION

The judgment of the District Court was entered on June 23, 1978 and held that denial of Mothers Insurance Benefits, 42 U.S.C. § 402(g), to illegitimate children and their mothers was unconstitutional. Appellant asserts jurisdiction of this appeal under 28 U.S.C. § 1252.

QUESTIONS PRESENTED

The Jurisdictional Statement, p. 2, suggests three questions for review. The first relates to the merits and the second to the appropriateness of class relief. The third question seeks to raise a defense never asserted in the court below, namely, sovereign immunity as a bar to retroactive benefits for the individual named plaintiffs. Appellees submit that this last issue is not properly before this Court.

APPELLEES' STATEMENT OF QUESTIONS PRESENTED

1. Is it unconstitutional to deny Mothers Insurance Benefits to all illegitimate children and their mothers while granting these benefits to all legitimate children and their mothers, regardless of actual dependency?

2. Where the action does not seek, and the District Court's order does not grant, Social

Security Benefits to members of the class, did the District Court have authority to order that all members of the plaintiff class be given notice that the unconstitutional marriage requirement was no longer a bar to their receipt of Mother's Insurance Benefits, so as to avoid forfeiture of benefits by the failure of unknowing claimants to apply?

3. May the defense of sovereign immunity be raised for the first time in this Court, if it was never raised or pleaded as an affirmative defense in the District Court?

STATEMENT

Mother's Insurance Benefits are provided under the Social Security Act, 42 U.S.C. § 402(g), to allow the surviving child of a deceased worker to receive the care of its surviving parent. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The three principal eligibility requirements for Mother's Insurance Benefits, so far as this case is concerned, are:

(1) that the child be eligible for or receiving Children's Insurance Benefits;

(2) that the child be in the care of its mother; and

(3) that the mother of the child had been

married to the deceased father, either at the time of his death or an earlier marriage followed by a divorce.

The first two requirements have been met herein. Plaintiff Boles is receiving Children's Insurance Benefits and is in the care of his mother, plaintiff Gonzales. All the other children who are members of the plaintiff class are also eligible for or actually are receiving Child's Benefits and are in the care of their mothers. The third requirement, marriage of the mother to the father, deprives plaintiff Boles and all other illegitimate children of the benefits of Mother's Insurance Benefits.

Plaintiff Boles is the son of an insured wage earner, Norman W. Boles, who died on October 10, 1971. The son and his mother, plaintiff Gonzalez, filed claims for Children's and Mother's Benefits under the Social Security Act. Plaintiff Boles was granted Children's Benefits, but plaintiffs were denied Mothers Benefits solely because the mother, plaintiff Gonzalez, had never been married to the deceased father.

After exhausting their administrative remedies, plaintiffs filed suit in the United States District for the Western District of Texas. The District Court certified the action as a class action on

behalf of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. § 402 (g)(1) restricts such benefits to women who were once married to the fathers of their children." Juris. Statement, App. A, pp. 1a-2a. The District Court then held that the marriage requirement for Mother's Benefits was unconstitutional discrimination against illegitimate children.

The District Court ordered payment of retroactive benefits to the individual plaintiffs. As to the class, the suit did not seek nor did the court order payment of benefits. The District Court enjoined the Secretary from denying benefits to the plaintiff class solely by reason of the marriage requirement. It also ordered the Secretary to notify "all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits." Juris. Statement, App. B, pp. 24a-25a. To actually receive benefits, all class members would still have to apply and meet all other eligibility requirements.

ARGUMENT

SUMMARY

The District Court correctly held that this Court's long line of decisions prohibiting discrimination against illegitimates in social welfare and other benefits, see Trimble v. Gordon, 430 U.S. 762, 766, n. 11 (1977), require the end of this invidious treatment of illegitimates in provision of Mother's Insurance Benefits. The opinion of this Court in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) is unequivocal in its holding that Mother's Benefits are intended to benefit the child who is "entitled to the personal attention of the surviving parent if that parent chooses not to work." 420 U.S. at 651. The District Court's opinion herein, including its detailed analysis of the statutory structure and legislative evolution of the Social Security Act provisions on Mother's Benefits, clearly demonstrates that the statute unconstitutionally denies this benefit solely on the basis of illegitimacy. The decision below should be summarily affirmed on the merits because the argument of appellant is so insubstantial as not to warrant further argument. Supreme Court Rule 16(c).

The class action aspect of the case did not involve any claim for Social Security Benefits. Therefore, the restrictions on actions set forth in the Social Security Act, 42 U.S.C. § 405(g) and (h), as interpreted in Weinberger v. Salfi, 422 U.S. 749 (1975), are not applicable. The basic relief afforded the class is a notice to the class, if this Court affirms on the merits, that they are no longer ineligible for benefits solely because of the marriage requirement and may apply for benefits. Without this notice, thousands of eligible claimants previously denied Mother's Benefits will not learn that they may now be eligible.

The defense of sovereign immunity was not raised in the District Court and may not be raised now for the first time. Dothard v. Rowlinson, 433 U.S. 321 (1977). Failure to plead or otherwise raise the issue below also constitutes a waiver of the defense. Federal Rule of Civil Procedure 8(c).

I. DENIAL OF MOTHER'S BENEFITS TO ALL ILLEGITIMATES AND THEIR MOTHERS AND GRANTING MOTHER'S BENEFITS TO ALL LEGITIMATE CHILDREN AND THEIR MOTHERS, REGARDLESS OF ACTUAL DEPENDENCY, IS UNCONSTITUTIONAL DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IN VIOLATION OF THE FIFTH AMENDMENT

A. *Mother's Benefits Are Intended As Benefits To The Child*

In *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) this Court held that Mother's Benefits are for the benefit of the child. An entire section of the opinion, Part II, Section B, (420 U.S. at 645-53), is devoted to the point. The following excerpts are but some of the repeated references to that statutory purpose in the opinion.

> ". . . § 402(g), linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. . . .
>
> "That the purpose behind § 402(g) is to provide children deprived of one parent with the opportunity for the personal attention of the other could not be more clear in the legislative history. The Advisory Council on Social Security, which developed the 1939 amendments, said explicitly that '/s/uch benefits (§ 402(g)) are intended as supplements to the orphan's benefits

> *with the purpose of enabling the widow to remain at home and care for the children.*' Final Report of the Advisory Council on Social Security 31 (1938). (Emphasis supplied.) In 1971, a new Advisory Council, considering amendments in the OASDI structure, reiterated this understanding: 'Present law provides benefits for the mother of young. . .children. . .if she chooses to stay at home and care for the children instead of working. In the Council's judgment, it is desirable to allow a woman who is left with the children the *choice* of whether to stay at home to care for the children or to work.' 1971. Advisory Council on Social Security, Reports on the Old-Age Survivors, and Disability Insurance and Medicare Programs 30 (1971) (hereinafter 1971 Reports). (Emphasis supplied.) 420 U.S. at 648-49.

This Court went on to explain that

> "The whole structure of survivor's benefits conforms to this articulated purpose (care of children)." 420 U.S. at 650.

It noted that widows without children obtain no benefits on the basis of their husband's earnings until they reach age 60, or in certain cases of disability, age 50. Mother's Benefits cease when the child is no longer eligible for Child's

Benefits or when the mother no longer has the child in her care or custody. Mother's Benefits also cease when the child reaches 18, although Children's Benefits may continue until age 22. This Court concluded that

> "This distinction also sustains our conclusion that § 402(g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since Mother's Benefits are linked to Children's Benefits only so long as it is realistic to think that the children might need the parent at home." 420 U.S. at 651, n. 17. (Emphasis added.)

The ruling of this Court is summed up in one sentence in Justice Rehnquist's concurring opinion:

> "I believe the Court's examination (of the legislative history) convincingly demonstrates that the only purpose of § 402(g) is to make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent, should that parent desire to remain in the home with the child." 420 U.S. at 655.

In these circumstances it is clear that as a result of the marriage requirement for Mother's Benefits, only illegitimate children are denied the benefit of the personal care and attention of a surviving parent.[1]

B. Discrimination in the Social Security Act Against Illegitimate Children in Providing Mother's Insurance Benefits Violates The Fifth Amendment

The decisions of this Court striking down discrimination against illegitimate children in Social Security and other social welfare benefits are collected in the opinion of this Court in its recent decision on the subject, Trimble v. Gordon, 430 U.S. 762, 766, n. 11 (1977). The essence of the holdings is set forth in Gomez v. Perez, 409 U.S. 535, 538 (1973).

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[1] Appellant suggests that the case does not involve discrimination against all illegitimates and therefore "does not entail discrimination against illegitimate children." Jurisdictional Statement, p. 12, fn.9. But this court held in Jiminez v. Weinberger, 417 U.S. 628 (1974) that discrimination against one sub-class of illegitimates was unconstitutional even though some illegitimates received the Social Security Benefits in question. Furthermore, the examples cited are inapposite. Denial of benefits to once illegitimate children who have been legitimated by operation of state law but remain ineligible for Mother's Benefits because their mother never married their father is yet another form of discrimination against illegitimate children. In a case where the woman caring for the child of the deceased is not the child's mother, and was never married to the deceased, she is simply a foster parent without any legal relationship to father or child. In that circumstance, Mother's Benefits are denied both legitimate and illegitimate children because they are not living with their mother.

> ". . .a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."

and in New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 621 (1973);

> ". . .appellants' claim of the denial of equal protection must be sustained, for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate."

This Court now permits disparate treatment of illegitimates only in situations which involve the special considerations applicable to proof of paternity. Lalli v. Lalli, No. 77-1115, 47 L.W. 4061 (December 11, 1978) and Mathews v. Lucas, 427 U.S. 495 (1976). These considerations do not apply here because no issue of paternity arises in the case of Mother's Benefits which are payable only to mothers and children where the children are already receiving Children's Benefits. Any question of paternity has already been resolved in the granting of Children's Benefits.

Moreover, the contrast between Jiminez v. Weinberger, 417 U.S. 628 (1974) and Trimble v. Gordon, 430 U.S. 762 (1977) on the one hand, and Lalli v. Lalli, supra, and Mathews v. Lucas, supra, on the other, illustrates the unconstitutionality of the statutory provision which denies Mother's Benefits to all illegitimates because their mother had not married their father, while granting them to all legitimate children. Both Jiminez and Trimble involved an absolute bar to Social Security Benefits or intestate inheritance for children whose mother had never married their father. In Lalli and Lucas, on the other hand, illegitimate children who established paternity or support in the manner prescribed by statute qualified for inheritance or Social Security Benefits.

Jiminez v. Weinberger, supra, involved the situation of children of a disabled insured worker born after the onset of the disability. After-born legitimate children and certain classes of after-born illegitimate children received Children's Insurance Benefits, but other after-born illegitimate children were barred from benefits, regardless of whether they were living with or dependent on the insured. This Court found that the statute was both overinclusive by granting benefits to children not dependent on the insured and underinclusive by denying benefits to some illegitimate children who were actually dependent on the insured. It concluded (417 U.S. at 637):

> ". . .hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment."

The case of Mother's Benefits at bar is even a stronger example of an unconstitutional statute because it encompasses a total exclusion of all illegitimates from Mother's Insurance Benefits and the inclusion of all legitimate children, regardless of dependency. Mathews v. Lucas, 427 U.S. 495 (1976), in contrast, involved only overinclusion, not underinclusion, since under the provision in question there, "any otherwise eligible child may qualify for survivorship benefits by showing contribution to support or cohabitation, at the time of death." 427 U.S. at 512. Unlike

here, the disfavored class had the opportunity to qualify for benefits by proving dependency.

Similarly, as this Court noted in Lalli v. Lalli (No. 77-1115, December 11, 1978), the Illinois inheritance statute in Trimble v. Gordon, 430 U.S. 762 (1977) "was constitutionally flawed because, by insisting upon not only an acknowledgement by the father, but also the marriage of the parents, it excluded 'at least some significant categories of illegitimate children. . .'". 47 L.W. at 4062. In contrast, in Lalli, ". . .the marital status of the parents is irrelevant. The single requirement at issue here is an evidentiary one--that the paternity of the father be declared in a judicial proceeding sometime before his death. The child need not have been legitimated in order to inherit from his father." Id. at 4063.

Appellant relies primarily on a Social Security case that does not involve discrimination against legitimate children at all, Califano v. Jobst, 434 U.S. 47 (1977). The distinction is of the essence. In the illegitimacy cases and those involving discrimination against women, Califano v. Goldfarb, 430 U.S. 199 (1977) and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), this Court has stricken most forms of disparate treatment of Social Security Benefits. In other cases, it has upheld general classifications, because "(g)eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, 434 U.S. 47, 53. In the latter class of cases, the principle of *Dandridge* v. *Williams*, 397 U.S. 471 (1970) applied, and the statute may draw distinctions in granting social welfare benefits so long as they have a rational basis, even though the classification is not made with mathematical certainty or results in some inequality. *Mathews* v. *de Castro*, 429 U.S. 181, 185 (1976). But the same cases also acknowledge that distinctions based on sex and illegitimacy are reviewed in a different fashion. For example, in *Califano* v. *Jobst*, *supra*, this Court noted that the marriage rule involved there "cannot be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group," 434 U.S. at 54, and cited *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), involving sex discrimination, *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974), involving discrimination against illegitimates, and *Loving* v. *Virginia*, 388 U.S. 1 (1967), involving race discrimination. 420 U.S. at n. 10.

Although the strict scrutiny applicable to race discrimination is not applicable to illegitimates, *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976), this Court has indicated that the courts must more closely analyze the statutory purpose and the rationality of the means sought to achieve it when discrimination against illegitimates results. In *Trimble* v. *Gordon*, 430 U.S. 762 (1977), the Court noted that although the strict scrutiny test is not applicable to illegitimacy cases, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis for statutory differentiation. 430 U.S. at 767. This Court then concluded:

> "Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' *Lucas* also establishes that the scrutiny 'is not a toothless one,' *id.*, at 510, 96 S.Ct. at 2764, a proposition clearly demonstrated by our previous decisions in this area." *Id.*

As the opinion of the District Court demonstrates convincingly, Jurisdictional Statement, App. B., p. 20a-22a, this Court has followed this pattern of careful evaluation in the past ten years. Most illustrative is *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974), where discrimination against a class of illegitimates in Social Security Benefits was held unconstitutional despite a strong argument that the differential treatment was necessary to prevent spurious claims of paternity. In contrast to the decisions in cases not involving illegitimates or sex, Chief Justice Burger's opinion for this Court closely examines the problem of spurious claims and finds they could be met without a blanket exclusion of a class of illegitimate children.

Where sex discrimination is involved, both *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) struck down provisions of the Social Security Act even though they rested on the wholly realistic assumption that men are less likely to be dependent on their wives than women on their husbands.[2] Similarly, Congress could just as rationally have concluded that illegitimate children receive less support from their fathers than legitimate children. But this Court has required that a finer line be drawn if discrimination against illegitimate children is ever to be sustained, and has overturned provisions of the Social Security Act and other statutes which wholly bar all benefits to illegitimates. *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974), *Davis* v. *Richardson*, 342 F.Supp. 588 (D.Conn.), *aff'd*, 409 U.S. 1069 (1972); *Griffin* v. *Richardson*, 346 F.Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972). The summary affirmances of *Davis* and *Griffin* are particularly instructive. These cases, along with *Weber* v. *Aetna Casualty and Surety Company*, 406 U.S. 164 (1972), involved provisions of the Social Security Act and the Louisiana Workers Compensation Act which provided that if total benefits exceeded the maximum allowable, all benefits to illegitimate children be reduced first, without any reduction for legitimates. These cases rejected the very same argument that Appellant offers here, that the greater *likelihood* of support for legitimate children renders total discrimination against illegitimates constitutionally permissible.[3] Moreover, the District Court's analysis of the allowance of Mother's Benefits in a number of situations, including the case of some divorced wives to whom no obligation of support is due and where there is little likelihood of support, see Jurisdictional Statement, App. B., pp. 10a-13a, demonstrates that the "likelihood of support" argument is nothing more than an after-the-fact excuse for discrimination based on status of birth.

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[2] In contrast, in *Mathews* v. *de Castro*, 429 U.S. 181 (1976), which *did not involve sex discrimination* but rather, a classification of wives as against divorced wives, this Court rested its decision on the fact that "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married."

[3] The *Weber, Davis* and *Griffin* cases also expressly *rejected appellant's claim* herein that possible reduction in benefits to the legitimate children can justify denial of benefits to illegitimate children.

This Court's admonition to look at the reality of the statutory purpose in classifications based on illegitimacy requires the conclusion that the total denial of Mother's Benefits to illegitimates is unconstitutional. The history of the Social Security Act reveals that Congress discriminated against illegitimate children by reason of the historic prejudice the law evidenced against them until this Court called a halt in Levy v. Louisiana, 391 U.S. 68 (1968). The District Court accurately concluded (Jurisdictional Statement, App. B., pp. 23a-24a):

> "The reality of the history of the Social Security Act is that the Act discriminated against illegitimate children because of the stigma of their birth, the very kind of legislation the Supreme Court has consistently condemned since 1968. Until 1965, twenty-six years after Children's Benefits were first instituted, the Social Security Act gave no benefits to illegitimate children. See Davis v. Richardson, 342 F.Supp. 588, 591 (D.Conn.), summarily aff'd, 409 U.S. 1069 (1972). Then Congress included illegitimate children but hedged their benefits with a series of discriminatory provisions, almost all of which have been struck down by the Supreme Court. The last vestige of this discrimination now appears to be before this Court, and the Court is of the opinion that it should suffer the same fate. Illegitimate children have an equal need and an equal right with legitimate children for the opportunity to have their mothers stay home and care for them when they are young."

II. THE SOCIAL SECURITY ACT, 42 U.S.C. § 405(h), DID NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION TO AFFORD THE CLASS RELIEF WHICH MERELY NOTIFIED CLASS MEMBERS OF THE REMOVAL OF THE UNCONSTITUTIONAL MARRIAGE REQUIREMENTS WHERE THE ACTION DID NOT SEEK RECOVERY OF SOCIAL SECURITY BENEFITS FOR CLASS MEMBERS

This case, unlike Weinberger v. Salfi, 422 U.S. 749 (1975), does not involve any claims for Social Security Benefits for members of the plaintiff class. Only the named plaintiffs, who exhausted their administrative remedies, will receive benefits under the order of the District Court. Juris. Statement, App. B., pp. 24a-25a. The complaint herein was expressly amended to delete any request for benefits on behalf of the class. The only relief awarded to the class is twofold:

(1) The Secretary is ordered to "notify all illegitimate children receiving Children's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits" (emphasis added). Juris. Statement, App. B., p. 25a.

(2) The Secretary is enjoined from denying benefits "to Plaintiffs and the Plaintiff Class on the basis of the marriage requirement declared unconstitutional herein." Juris. Statement, App. B., p. 24a. A decision of this Court affirming would have the same effect, so that the real importance of the class action is that it affords notice of the result to the members of the class.

As to the class, this is not an action "to recover on any claim" arising under Title II of the Social Security Act nor to review any decision or findings of fact of the Secretary. See 42 U.S.C. §§ 405(g) and (h). As this Court noted in Mathews v. Eldridge, 424 U.S. 319 (1976), Weinberger v. Salfi, supra, held that 42 U.S.C. § 405(h) precludes federal question jurisdiction "in an action challenging denial of claimed benefits." (Emphasis added.) 424 U.S. at 327.

Salfi required exhaustion of administrative remedies, but only where the suit sought recovery of benefits. The District Court in Salfi had expressly ordered the Secretary "to provide such benefits (to the entire class) from the time of original entitlement." See 422 U.S. 749, 755-56. Since Salfi was a suit to recover benefits and many members of the certified class had not exhausted their remedies, no jurisdiction existed to award benefits to the class.

The language of § 405(g) and (h) makes it clear that they are no bar to the class relief awarded herein. Regardless of whether class relief is authorized in suits relying solely on 42 U.S. § 405(g), an issue before this Court in Califano v. Elliott, cert. granted, No. 77-1511 (Oct. 3, 1978), jurisdiction as to the class herein exists under 28 U.S.C. § 1331, as a constitutional claim is asserted. Jurisdiction under § 1331 is not barred by 42 U.S.C. § 405(h) because that section applies only to claims for benefits, whereas the claim here on behalf of the class does not seek benefits but only a notice that the unconstitutional barrier to their receipt of benefits has been removed. Each member of the plaintiff class must still file a claim and satisfy all the remaining requirements for Mother's Benefits, and even in such a case, the District Court has not ordered payments of benefits.

If the limited relief of notice to the class is denied, and the District Court is affirmed on the merits, thousands of eligible families will continue to be unconstitutionally denied benefits, unless they happen to read the United States Reports. Without notice, these families will continue to believe what they were told when they went to the Social Security office on the death of the father of the child--that they are eligible only for Children's Benefits. On the other hand, if this Court reverses on the merits, the class will be bound by the decision under the doctrine of _stare decisis_. There is nothing in the Social Security Act which requires such an unjust and discriminatory result.

III. THE DEFENSE OF SOVEREIGN IMMUNITY IS NOT BEFORE THIS COURT BECAUSE IT WAS NOT RAISED IN THE COURT BELOW AND WAS NOT PLEADED AS AN AFFIRMATIVE DEFENSE

A. The Defense of Sovereign Immunity Was Not Raised Below and May Not Be Asserted Here.

Question 3 of the Jurisdictional Statement, p.2, seeks to place before this Court the issue of whether sovereign immunity bars the District Court's award of Mother's Insurance Benefits to the named plaintiffs retroactive to the time prescribed by the Social Security Act, 42 U.S.C. § 402(j)(1) (twelve months prior to date of filing an application). This question was not presented to the Court below, either by answer or otherwise. It may not be raised for the first time herein.

Issues not raised in the courts below cannot be raised for the first time on appeal before this Court. This rule was recently reiterated in a case involving a direct appeal from a District Court, _Dothard_ v. _Rowlinson_, 433 U.S. 321, n.1 (1977), where this Court stated:

> "The appellants sought to raise for the first time in their brief on the merits the claim that Congress acted unconstitutionally in extending Title VII's coverage to state governments. . . (citations omitted). _Not having been raised in the District_

> Court, that issue is not before us. (Emphasis added.)

The rule is of long standing. See, e.g., Tyrrell v. District of Columbia, 243 U.S. 1 (1917) and Adkickes v. S. H. Kress & Co., 398 U.S. 144, 147, n.2 (1970.

There are no exceptional circumstances here to warrant a deviation from the general rule. See Duignan v. United States, 274 U.S. 195, 200 (1927). Retroactive relief was granted only to the named plaintiffs (Juris. Statement, App. B, pp. 24a-25a). All that is involved in retroactive benefits is a few thousand dollars to the individual named plaintiffs.

B. Any Defense of Sovereign Immunity Was Waived By Failure To Plead It As An Affirmative Defense or Otherwise Raise It Below.

Any defense of sovereign immunity appellant may have had was waived by failure to plead it as an affirmative defense, Federal Rule of Civil Procedure 8(c), see Answer, or otherwise raise it in the District Court. "The plea of sovereign immunity constitutes an affirmative defense," Aerotrade, Inv. v. Republic of Haiti, 376 F.Supp. 1281, 1283, n.7 (S.D.N.Y. 1974). See also. Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.), cert. den., 385 U.S. 931 (1966). ". . . technically speaking, sovereign immunity is not a

jurisdictional defect but rather a substantive defense like incapacity or incompetency." Pan American Tankers Corp. v. Republic of Vietnam, 291 F.Supp. 49, 52 (S.D.N.Y. 1968). Cf. Federal Rule of Civil Procedure 9(a). See also, Green v. James, 473 F.2d 660 (9th Cir. 1973).

If an affirmative defense is not pleaded, it is waived. 2A Moore, Federal Practice ¶ 8.27(3), p. 1853 (2d ed. 1975). Radio Corporation of America v. Radio Station KYFM, Inc., 424 F.2d 14 (10th Cir. 1970). Congress made it clear that sovereign immunity is waived by failure to plead affirmatively by providing in the Foreign Sovereign Immunities Act of 1976, P.L. 94-583, that sovereign immunity may be waived "explicitly or by implication," 28 U.S.C. § 1605(a)(1). The Report of the House Judiciary Committee, House Report No. 94-1487 (Sept. 9, 1976) states:

> An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." 5 U.S. Code, Cong., Admin. News, 94th Cong., 2d Sess., p. 6617.

CONCLUSION

The judgment of the District Court should be affirmed.

RESPECTFULLY SUBMITTED,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-808

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES,
AND ALL OTHERS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court (J.S. App. 3a-28a) is not reported.

JURISDICTION

The order of the district court, holding unconstitutional 42 U.S.C. 402(g)(1), was entered on June 23, 1978. A notice of appeal to this Court was filed on July 20, 1978 (J.S. App. 29a-30a). On September 12, 1978, Mr. Justice Powell extended the time for docketing the appeal to and including November 17, 1978, and the appeal was docketed on November 15, 1978. This Court noted probable jurisdiction on January 22, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTIONS PRESENTED

1. Whether Section 202(g)(1) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by restricting mothers' insurance benefits to women who were once married to the deceased wage-earners.

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Social Security benefits under a statutory section later held to be unconstitutional.

3. Whether the district court properly certified a nationwide class that includes persons not shown to have met the jurisdictional requirements of Section 205(g) of the Social Security Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 202(g)(1) of the Social Security Act, 42 U.S.C. 402(g)(1), provides in pertinent part:

> The widow and every surviving divorced mother (as defined in section 416(d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
>
> (E) at the time of filing such application has in her care a child or such individual entitled to a child's insurance benefit, and
>
> (F) in the case of a surviving divorced mother—

> (i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and
>
> (ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income

shall * * * be entitled to a mother's insurance benefit * * *.

3. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action * * * . Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business * * *.

4. Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), provides in pertinent part:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

5. Section 216(d)(3) of the Social Security Act, 42 U.S.C. 416(d)(3), provides:

> (3) The term "surviving divorced mother" means a woman divorced from an individual who has died, but only if (A) she is the mother of his son or daughter, (B) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18, (C) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of 18, or (D) she was married to him at the time both of them legally adopted a child under the age of 18.

6. Section 216(h)(1)(A) of the Act, 42 U.S.C. 416(h)(1)(A) provides in pertinent part:

> An applicant is the * * * widow * * * of a fully or currently insured individual for purposes of this subchapter if * * *, such insured individual is dead, the courts of the State in which he was domiciled at the time of death * * * would find that such applicant and such insured individual were validly married * * * at the time he died. If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the * * * widow * * * of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a * * * widow * * * of such insured individual.

STATEMENT

1. Section 202(g)(1) of the Social Security Act provides benefits to the widow[1] of a wage-earner who dies fully or currently insured under the Act, if she has in her care a child of the wage-earner[2] entitled to a child's insurance benefit, if she is not currently married, and if she is not otherwise entitled to an equal or greater social security benefit. The divorced wife of a deceased insured wage-earner is entitled to monthly benefits under the same conditions, but only if the wage-earner's entitled child in her care also is her own natural or adopted child. 42 U.S.C. 402(g)(1)(F). In order to qualify as the wage-earner's widow, a claimant must generally either have been married to the wage-earner for at least nine months before his death or have had a natural or adopted child with him.[3] 42 U.S.C. 416(c); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). There is no requirement that she be the mother of the entitled child in her care. Although these benefits originally were called "widow's current insurance benefits," the name was changed to mother's benefits in 1950, when protection was first accorded to the "former wife divorced" (now "surviving divorced mother").[4]

An entitled child who is a full time student receives separate benefits until he reaches 22, but the mother's benefit ceases when the child reaches 18. 42 U.S.C. 402(s)(1).[5] A covered person (mother or child) loses her entitlement to benefits if she earns more than a given amount during a particular period, but neither the child's benefit nor the mother's benefit is affected by the earnings of the recipient of the other. 42 U.S.C. 403.

2. Norman W. Boles, an insured wage-earner, died on October 10, 1971. His widow, Nancy L. Boles, and their two children were awarded mother's and chil-

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[1] This Court held in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), that the benefits of Section 202(g)(1) are available to widowers of female wage-earners. In the interest of clarity, we follow the statute and refer simply to the widow.

[2] The child may be the wage-earner's natural, adopted, or step child, or his grandchild, 42 U.S.C. 416(e). See *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

[3] A woman may be deemed the widow of the wage-earner even though she was never validly married to him in two circumstances: (1) if she is entitled to the same status as a widow under the intestate succession laws of the state in which the wage-earner was domiciled at the time of his death, or (2) if she in good faith went through a marriage ceremony with the wage-earner that would have resulted in a valid marriage but for a legal impediment of which she was not aware, she was living with the wage-earner when he died, and no one else is or has been entitled to benefits as his widow. 42 U.S.C. 416(h)(1).

[4] The statutory definitions of "divorced wife" and "surviving divorced wife" apply only to the elderly beneficiaries of wife's and widow's benefits; a divorced person receiving mother's benefits is defined as a "surviving divorced mother." 42 U.S.C. 416(d). 42 U.S.C. 402(g) provides benefits for "the widow or surviving divorced mother" of a wage-earner, but only if she is not entitled to a widow's benefit. Consequently, surviving wives' benefits are provided through the statutory reference to mothers.

[5] If the child is disabled and unmarried, these age limits do not apply. 42 U.S.C. 402(d). See *Califano* v. *Jobst*, 434 U.S. 47 (1977).

dren's insurance benefits. On January 15, 1973, Margaret Gonzales, a woman with whom Norman W. Boles had lived from 1963 to 1966 but whom he had never married,[6] filed claims for mother's insurance benefits for herself, and for children's insurance benefits for her son, Norman J. Boles. The claim for children's insurance benefits was granted under Section 202(d) (42 U.S.C. 402(d)),[7] and the monthly benefits payable to Nancy Boles and her two children were reduced to permit the payment of benefits to Norman J. Boles without exceeding the family maximum allowed under Section 215 (42 U.S.C. 415). The claim for mother's insurance benefits was denied because Gonzales never was married to Boles and therefore did not meet the eligibility requirements of Section 202(g)(1) (J.S. App. 4a-6a).

After exhausting her administrative remedies, Gonzales filed this suit in the United States District Court for the Western District of Texas. The district court certified the case as a class action on behalf of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. § 402(g)(1) restricts such benefits to women who were once married to the fathers of their children" (J.S. App. 1a-2a). The district court then held that "Section 202(g)(1) of the Social Security Act, 42 U.S.C. § 402(g)(1), is unconstitutional and void insofar as it prevents Plaintiffs and the Plaintiff Class from receiving Mother's Insurance Benefits solely on the ground that Plaintiff mothers were never married to the fathers of their children" (J.S. App. 24a).

The court interpreted *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), as holding that mothers' insurance benefits are intended solely as a benefit to the children of the wage-earner. It then concluded that the marriage requirement "encompasses a total exclusion of all illegitimates from Mother's Insurance Benefits and a total inclusion of all legitimate children" (J.S. App. 18a). It held that such a classification violates the equal protection principles discussed in this Court's cases considering statutes dealing with illegitimate children, particularly *Trimble* v. *Gordon*, 430 U.S. 762 (1977), and *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). The district court permanently enjoined the Secretary from denying benefits to plaintiffs and the plaintiff class on the basis of the marriage requirement, ordered the Secretary to pay mother's insurance benefits to Gonzales and her son retroactive to the date of Gonzales' claim, and directed the Secretary to notify "all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason for the marriage requirement" (J.S. App. 24a-25a).

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[6] Norman W. Boles married Nancy L. Boles in 1967.

[7] The wage-earner had acknowledged his paternity of Norman J. Boles (J.S. App. 5a). See 42 U.S.C. 416(h)(3); *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

SUMMARY OF ARGUMENT

I

Congress has used marriage throughout the Social Security Act as a means of determining eligibility for benefits, and this Court has recognized that marriage is a rational criterion on which to base a conclusion of probable dependnce. The marriage requirement serves precisely that function here. Although, as this Court held in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), the mother's insurance benefit is designed to permit the recipient to remain home to care for the entitled child in her care, Congress is entitled to offer that option to the wage-earner's widow or former wife, who is likely to have relied on the wage-earner for support during his lifetime, and not otherwise to the mother of the child to be cared for.

The restrictions on receipt of a mother's benefit reflect the general statutory scheme of relying on relationship to the insured wage-earner to define the categories of beneficiaries entitled to the replacement of lost support. Thus, the child's and the mother's benefit each depend on the beneficiary's relation to the wage-earner, not on their relationship to each other. The mother's benefit is paid to a particular category of spouses—the group that is suddenly required to replace the support presumably lost by the wage-earner's death and needed because of their responsibility for his entitled child. The benefit is not based on a legislative desire to encourage mothers to take care of their own children, or to provide an indirect and erratic economic supplement to the children's benefit.

Of course, because most children are in fact in the care of their mothers, the marriage requirement has an indirect effect on the class of entitled illegitimate children, whose mothers normally cannot qualify for benefits. But that indirect effect is not sufficient to invalidate the rational statutory classification. It does not reflect intentional discrimination against illegitimates.

Even under the intermediate level of scrutiny applicable to classifications based on illegitimacy, the requirement passes constitutional muster. It bears a substantial relation to a legitimate federal interest—the interest in defining, by easily applicable criteria, the categories of beneficiaries most likely to have been dependent on the wage-earner, and then allocating the limited resources of the trust fund in a way that will adequately replace the support lost. The extension of mother's benefits to unmarried mothers would not serve either purpose, since those mothers are, as a class, significantly less likely to have been dependent on the wage-earner than the mothers eligible under the statute, and the extension often would mean, because of the maximum benefit provisions, that inadequate support would be provided to two families rather than adequate support to one.

II

Sovereign immunity bars the payment of retroactive benefits to Gonzales even if the statute is unconstitutional. The United States has not waived its sovereign immunity to permit recoveries of money as an accrued liability for actions taken in reliance on an unconstitutional statute. Neither Section 205(g) nor Section 204(a) of the Social Security Act authorizes recovery on claims alleging that benefits were denied in accordance with an unconstitutional statutory provision. Section 205(g) is merely a grant of jurisdiction, and Section 204(a) authorizes only payment of past-due benefits to which a claimant was statutorily entitled. Gonzales admittedly was not entitled to benefits under the Act because she was never married to Boles, and she therefore cannot receive retroactive payments.

III

Section 205(g) of the Social Security Act does not authorize class relief. It is particularly inappropriate to provide relief, as did the district court, to the precise class that would be unable to obtain judicial review under Section 205(g) because they have not filed a claim for benefits.

ARGUMENT

I

THE MARRIAGE REQUIREMENT OF ELIGIBILITY DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST ILLEGITIMATE CHILDREN

This case involves a marriage requirement of a kind that is familiar to the Court. The Social Security Act is replete with requirements based on familial relationship, including marriage, and this Court has reviewed and sustained many of them. See, *e.g.*, *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Mathews* v. *DeCastro*, 429 U.S. 181 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). The district court acknowledged the force of these cases but distinguished them on the ground that to make mothers' insurance benefits turn on marriage would be to discriminate against the illegitimate children of the unmarried mothers.

The district court's treatment of a marriage rule as "discrimination" against the illegitimate children of the unmarried mothers has some surface plausibility. After all, it is usually marriage that defines the difference between legitimacy and illegitimacy. There is, consequently, some apparent tension between the line of cases sustaining marriage requirements as rationally related to a legitimate purpose and the line of cases (*e.g.*, *Trimble* v. *Gordon*, 430 U.S. 762 (1977)) subjecting distinctions based on illegitimacy to some enhanced scrutiny. But this case does not present an occasion for the Court to address whatever tension there may be between the two lines of cases. The rationales of the decisions do not come into conflict unless the marriage requirement, as applied to a mother, has a significant or direct effect on the legal rights of the illegitimate child.

The district court found such an effect here because it concluded that the benefits in question, although denominated as mothers' benefits, really are intended for the assistance of the children. Consequently, the district court held, the case must be viewed from the child's perspective and be treated as a distinction based on illegitimacy, rather than from the mother's perspective as a distinction based on marriage to the wage-earner. In the argument that follows, we show that the district court misunderstood the nature of the benefits in question. This case should be evaluated from the mother's perspective rather than from the child's. So viewed, the statute is constitutional under the Court's analysis in *Jobst*, *DeCastro*, and *Salfi*.

A. The Mother's Benefit Is Designed To Provide Support For The Wage-Earner's Spouse

As this Court frequently has noted, many kinds of "secondary" benefits paid under the complex scheme of the Social Security Act are designed to ameliorate the economic difficulties caused by the loss of earnings when a wage-earner retires or dies. These benefits are paid to "secondary beneficiaries" who become eligible because of their relationship to the wage-earner. The legislative decision to make a particular class of persons eligible usually reflects a determination by Congress that persons in this class are likely to have been dependent on the wage-earner. See, *e.g.*, *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974); *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977) (plurality opinion); *Mathews* v. *DeCastro*, *supra*, 429 U.S. at 185-186; *Califano* v. *Jobst*, *supra*, 434 U.S. at 52. But eligibility does not generally depend on proof of actual dependence. Instead, Congress has established general rules of eligibility that reflect assumptions about the likelihood of dependence for the class as a whole. Although such rules will not accurately reflect actual dependence in every specific case, "[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency." *Califano* v. *Jobst*, *supra*, 434 U.S. at 53. It is not a constitutional requirement that the statutory classification " 'precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute.' " *Mathews* v. *DeCastro*, *supra*, 429 U.S. at 189. See also *Mathews* v. *Lucas*, 427 U.S. 495, 516 (1976); *Weinberger* v. *Salfi*, *supra*; cf. *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978). The Due Process Clause of the Fifth Amendment prohibits only the use of classifications that are " 'patently arbitrary' " and " 'utterly lacking in rational justification.' " *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 768. Measured by these well-settled principles, the marriage rule in Section 202(g)(1) is constitutional.

Weinberger v. *Salfi* dealt with the same statute that is at issue here. The Court held that the nine month duration of marriage requirement applicable to a widow with the wage-earner's step child in her care is not inconsistent with the equal protection component of the Due Process Clause. In *Mathews* v. *DeCastro* the Court found no constitutional defect in treating divorced wives of retired wage-earners differently from those who have not been divorced, even though both are caring for his entitled children. Surely persons who were married to the wage-earner are more likely to be dependent in fact than are those who were not. As this Court emphasized in *Califano* v. *Jobst*, *supra*, 434 U.S. at 53, "[b]oth tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status." Cf. *Labine* v. *Vincent*, 401 U.S. 532, 538 (1971). If Congress constitutionally can deny secondary benefits to persons who, like the married or formerly married claimants in *Salfi* and *DeCastro*, were moderately likely to have been dependent on the wage-earner. it surely can deny benefits to a class of never-married persons who were less likely to have been dependent. A woman who never was married to the wage-earner, even though he was the father of their child, is less likely to have been dependent on the wage-earner than was his wife, or even his former wife. If he did not choose voluntarily to support the unmarried mother, in most states she had no legal recourse to compel him to do so.[8]

Furthermore, the denial of benefits to unmarried mothers does not have the defect condemned in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-176 (1972), of imposing legal burdens on the child for the actions of his parents. It simply recognizes that what parents do or do not do can have consequences for the parents themselves. See also *Jimenez* v. *Weinberger*, *supra*, 417 U.S. at 632 (1974).

For these reasons, if the mother's benefit is viewed as providing for those women who, because of their relationship to the wage-earner, were most likely to

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[8] In most states she might have required him to support their child but not to support her. This difference is reflected in federal law; a child's eligibility for social security benefits does not depend on his mother's marriage. See 42 U.S.C. 402(d); *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

have been dependent on him for support, the marriage requirement is sufficiently adequate as a means of "filter[ing] out those * * * who are in the factual position which generated the congressional concern" that it passes constitutional muster. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 777.[9]

B. The Benefit Is Not Designed To Permit The Entitled Child's Mother To Care For Him

The mother's benefit is designed to replace the support the wage-earner's wife lost by his death, and thus to preserve for her the option of staying home to care for the children who were likewise deprived of his support by his death—whether or not she is the mother of those children, and whether or not those children are legitimate. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648-653 (1975). Here, as in most of the secondary beneficiary classifications, entitlement turns on each beneficiary's relation to the wage-earner, not on the relationship between the beneficiaries.[10]

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[9] The district court concluded (J.S. App. 10a-13a) that the current statute "has no relationship to support requirements" because no proof of support or cohabitation is required as a conditions of entitlement to mothers' benefits. But this analysis overlooks the fact recognized in *Jobst* and other cases that Congress has used simple objective criteria to define the groups entitled to benefits because of their probable dependence, and it has eschewed case-by-case determination of actual dependence on the wage-earner as either a necessary or a sufficient condition of eligibility. Moreover, as Congress has identified specific groups whose probable dependence merits recognition, those groups have been included, even though the resultant pattern of benefits excludes some who might reasonably also have been included. *Califano* v. *Jobst*, *supra*, 434 U.S. at 57-58; *Mathews* v. *DeCastro*, *supra*, 429 U.S. at 189; *Mathews* v. *Lucas*, *supra*, 427 U.S. at 515-516.

Contrary to the assumption of the district court, the statute does not reflect a congressional judgment that a child's *mother* should have the option of caring for him or working, coupled with an arbitrary refusal to provide benefits to a mother who was not married to her child's father. Cf. *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973). The district court's reasoning amounts to saying that the statute is contrary to its own policy. But there is no such peculiarity. Congress gave to wage-earners' wives the

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[10] It is true that the entitlement of the "surviving divorced mother" is based on her parentage of the wage-earner's child, a reasonable additional requirement where divorce has severed the family unit. Congress reasonably could conclude that it was unnecessary to provide for the highly unusual situation in which a woman would be caring for the child of her divorced husband who was not her own. Moreover, the eligibility of surviving divorced mothers was originally conditioned on the demonstration that she was receiving, or entitled to receive, substantial contributions to her support from the wage-earner when he died. 42 U.S.C. (1970 ed.) 402(g)(1)(F). That requirement was eliminated in 1972 because Congress concluded that it was inequitable in states in which the divorce laws prohibit alimony, or when a woman accepts a property settlement in lieu of alimony. Pub. L. No. 92-603, Section 114(c), 86 Stat. 1348; H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 54-55 (1971). There is, in any event, no constitutional requirement that a woman who has never married the wage-earner be treated in the same way as one whose marriage to him has ended in divorce. See *Mathews* v. *DeCastro*, *supra*.

option to forego working. The decision to give the option to wives, regardless of their relation to the entitled children in their care,[11] reflects a rational judgment that a family unit in existence at the wage-earner's death is one meriting consideration, whether or not the children in it are related to the widow.[12] The district court simply disagreed with the congressional judgment about who should be offered the option of remaining at home to care for the entitled child—the wage-earner's spouse or the child's mother. There is no constitutional reason to reject the congressional choice.[13]

Of course, the wage-earner's spouse will normally be the child's parent, as in *Wiesenfeld;* the Court's language there reflected that typical situation. Thus, the Court's conclusion (420 U.S. at 651) that Section 402(g) reflects "the principle that children of covered employees are entitled to the personal attention of the surviving parent if that parent chooses not to work" must be read in the context of the issue presented in that case: whether the widower, as well as the widow, of the wage-earner was entitled to the option of remaining home to care for the child of their marriage. The Court did not consider, much less decide, whether that option also must be offered to the never-married parent of the wage-earner's child.

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[11] For example, a woman who is caring for her deceased husband's illegitimate child by another woman, or for the child of his first marriage, is entitled to receive mother's benefits.

[12] This statutory scheme cannot be dismissed as the result of drafting inadvertence, because Congress was cognizant of the difference and directed that benefits be paid to a mother with her own child in her care in the case of surviving divorced mothers.

[13] Indeed, requiring that the option be extended to the child's mother who is not the wage-earner's spouse frequently will defeat the fundamental purpose of the benefit. See text at notes 21 and 22, *infra*.

The district court's view that the mother's benefit is simply a supplementary benefit for the child is wrong. The benefit is designed to provide the beneficiary with the option of remaining home to care for the entitled child. That is why the Court held in *Wiesenfeld* that the same opportunity must be given to male surviving spouses (see 420 U.S. at 648-653). The statute offers the option to the spouse. No child has a right to insist that his parent take the benefit and stay at home rather than reject the benefit and work. It distorts the statute to read it as expressing a federal policy favoring mothers as the caretakers of their children.

The child has his own, and entirely separate, entitlement to benefits. Appellee Norman J. Boles is receiving such benefits. Because the widow can reject the mother's benefits and elect to work, it would be improper to view the mother's benefit as a separate source of child support. The fact that mothers' benefits really are intended for the benefit of the mother is illustrated by the case of foster homes: a child of a wage-earner living with foster parents still receives a child's benefit, but the foster parent is ineligible for a mother's benefit. This is so even though a child

in foster care may have more need than a child in parental care. See *Miller* v. *Youakim*, No. 77-742 (Feb. 22, 1979).

Moreover, there is no apparent reason why the size of a supplemental children's benefit should vary with the number of children in the household, as does the mother's benefit, which gets smaller as the number of entitled children increase.[14] See pages 28-29, *infra*. In sum, if Congress considered the children's benefit insufficient, it would surely have devised a more direct and reasonable way to supplement it than by providing a mother's benefit.[15]

The legislative history on which the Court relied in *Wiesenfeld* also demonstrates the congressional intent to benefit a particular class of widows considered particularly likely to need the replacement of lost support, rather than to provide an indirect and erratic supplement to the children's benefit. As the Court noted in *Wiesenfeld, supra*, 420 U.S. at 649-650, Congress considered in 1939 providing benefits to all widows, but it decided that young widows without children in their care reasonably could be expected to work to support themselves (so they did not receive benefits), and middle-aged widows with grown children were likely to have more savings than younger widows, and to be able to look to their children for support (they, too, were not given benefits). Report of the Social Security Board, H.R. Doc. No. 110, 76th Cong., 1st Sess. 7-8 (1939). Accordingly, benefits were provided for only the particular group of widows that Congress concluded should not be required to replace by other means the support they presumably lost on their husbands' deaths.[16] Benefits later were extended to the class of divorced women that Congress deemed to be in essentially the same situation as the young widow with an entitled child in her care—divorced wives receiving, or entitled to receive, substantial support from their former husbands and caring for their natural or adopted children.[17]

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[14] In addition, although by continuing the children's benefit Congress recognized that the full-time student's need for support between 18 and 22 is as great as that of a younger child, the mother's benefit stops when the child reaches 18. This difference in treatment reflects the fact that, although the child's economic needs have not diminished, there is less need to offer a wife an option to stay home to care for the child.

[15] Extending mother's benefits to natural mothers, as appellees suggest, would not change these effects.

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[16] The fact that the widow who remarries loses her entitlement to mother's benefits also demonstrates that they were designed to replace the loss of the wage-earner's support, since on remarriage the widow can look to her new husband for support. Similarly, a wife with substantial earnings from her own employment does not receive mother's benefits, since she has herself replaced her lost support. The benefits of entitled children in her care are not affected by these circumstances, since their benefits are independent of hers.

[17] The later elimination of the support requirement for divorced wives was based on considerations unrelated to a belief that any minor child should be entitled to the personal attention of his mother, regardless of her relation to his father (note 10, *supra*).

C. The Eligibility Requirements For Mothers' Benefits Have At Most An Incidental Effect On Illegitimate Children

Although, as we have shown, the mother's benefits are intended to replace the support lost by the wage-earner's wife with an entitled child in her care, the marriage requirement undoubtedly has the incidental effect of denying benefits to many family units containing illegitimate children. We submit that this does not affect the constitutionality of the statute.

A child's own entitlement is defined by a statutory scheme that takes his illegitimacy into account in a way that, this Court held, is constitutionally proper. *Mathews* v. *Lucas*, 427 U.S. 495 (1976). There is no flat denial of benefits to illegitimates, as in, *e.g.*, *New Jersey Welfare Rights* v. *Cahill*, 411 U.S. 619 (1973); *Levy* v. *Louisiana*, 391 U.S. 68 (1968); and *Gomez* v. *Perez*, 409 U.S. 535 (1973).[18]

Moreover, even the incidental advantage ~~of~~ to the household in which a child resides of the payment of mother's benefits is not contingent on legitimacy. Many children, legitimate and illegitimate, receive their own benefits but live in family units headed by persons not entitled to mothers benefits. This may occur when the family head was never married to the wage-earner, when the surviving parent with whom the children live has remarried, and when they live with foster parents. And many illegitimate children live in the same family unit as the wage-earner's surviving spouse; these illegitimates receive any incidental support that mothers' benefits may provide, as do children living with persons deemed the spouse of the wage-earner by virtue of 42 U.S.C. 416(h)(1) (see note 3, *supra*)).[10] The district court's belief that all legitimate children receive some support from mother's benefits, and no illegitimate children do (J.S. App. 18a), is simply wrong.

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[18] Indeed, appellee Norman J. Boles is receiving a child's benefit based on his father's earnings.

In other words, the eligibility of a person for mother's benefits does not turn on the legitimacy of the children in the household. Any effect on illegitimate children as a class caused by the status of their mothers is at most a disproportion unaccompanied by discriminatory motive. Under the standards of *Washington* v. *Davis*, 426 U.S. 229 (1976), the existence of a disproportionate effect on households containing illegitimate children does not show that the statute producing the effect should be subjected to special scrutiny.

Even if the effect on households containing illegitimate children were intended in some way, however, this would not undermine the validity of the statute. In *Califano* v. *Jobst*, *supra*, 434 U.S. at 58, and *Califano* v. *Aznavorian*, No. 77-991 (Dec. 11, 1978), slip op. 7-8, this Court upheld, against claims that they denied equal protection, statutes that had an incidental effect on constitutionally protected interests—even (in *Jobst*) fundamental ones. Similarly, the incidental disparate effect of this statute on illegitimate children does not deny them equal protection.

D. The Statute Is Substantially Related To Important Goals

If the Court should conclude that the incidental effect of the statutory classification on illegitimate children requires that it be given special scrutiny, the Court nevertheless should hold that the statute does not violate the equal protection component of the Fifth Amendment.

As the district court concluded, several of this Court's recent decisions suggest that in evaluating statutory classifications based on illegitimacy, a somewhat closer scrutiny than that traditionally applied to laws regulating economic and social conditions may be appropriate. See, *e.g.*, *Trimble* v. *Gordon*,

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[10] Appellees argue (Motion to Dismiss or Affirm at 11 n.1) that only children living with their mothers should be compared. But as we argued at pages 17-22, *supra*, the statute can not reasonably be read as basing entitlement on motherhood.

Appellees also suggest that children legitimated by operation of state law living with their mothers who receive no benefits because they were never married to the wage earners are not "really" legitimate. This argument, like their claim that mother's benefits are "really" children's benefits, simply redefines reality to suit their claims. Even if appellees' definitions of the comparable group are correct, however, the statute does not baldly distinguish between legitimate and illegitimate children, since legitimate children living with their remarried mothers do not have the incidental advantage of mother's benefits, and illegitimate children living with the wage-earner's spouse do. Although the disqualification of the remarried mothers does not result from the marriage requirement at issue here, this Court in *Jobst*, *supra*, 434 U.S. at 55, noted the importance of considering the statutory classification as a whole.

supra. But see *Mathews* v. *Lucas, supra,* 427 U.S. at 505.[20] But this Court has declined all invitations to subject such classifications to the "strict" scrutiny required when "suspect" classifications are involved. See, *e.g., Mathews* v. *Lucas, supra,* 427 U.S. at 505; *Trimble* v. *Gordon, supra,* 430 U.S. at 766-767; *Lalli* v. *Lalli, supra,* plurality slip op. 5. Classifications based on legitimacy thus sometimes may be justified by the practical need of legislators to make classifications that deal with broad groups of persons and omit case-by-case decisionmaking. *Lalli* v. *Lalli, supra,* plurality ship op. 13. Cf. *Vance* v. *Bradley,* No. 77-1254 (Feb. 22, 1979), slip op. 14-15. As the Court explained in *Mathews* v. *Lucas, supra,* 427 U.S. at 509-510 (citations omitted):

> In cases of strictest scrutiny, such approximations must be supported at least by a showing that the Government's dollar "lost" to overincluded benefit recipients is returned by a dollar "saved" in administrative expense avoided. Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be " 'scientifically substantiated.' " Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses. Finally, while the scrutiny by which their showing is to be judged is not a toothless one, the burden remains upon the appellees to demonstrate the insubstantiality of that relation.

In sum, even in cases involving statutes that impose direct, rather than incidental, burdens on illegitimates, the Court "does not focus on the abstract 'fairness' of [the challenged] law, but on whether the statute's relation to the [governmental] interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the [Fifth] Amendment." *Lalli* v. *Lalli, supra,* plurality slip op. 13. The question is simply whether the statutory provisions concerning illegitimate children "bear an evident and substantial relation to the particular [federal] interests this statute is designed to serve." *Id.* at 8. In light of *Mathews* v. *Lucas, supra,* the particular classification at issue here meets this test.

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[20] The Court in *Lucas* refused to treat illegitimacy as a constitutionally suspect classification meriting the strict scrutiny applied to classifications based on race or national origin, stating (427 U.S. at 505) that "we have had no difficulty in finding the discrimination [against illegitimates] impermissible on less demanding standards than those advocated here." Although that language is consistent with the application of an intermediate test for classifications involving illegitimacy, the Court in *DeCastro*—a case involving a neutral classification—referred to *Lucas* as demonstrating "the standard by which legislation such as this must be judged" (429 U.S. at 181). The plurality opinion in *Lalli* v. *Lalli, supra,* later cited *Lucas* as applying an intermediate standard to classifications involving illegitimacy (plurality slip op. 5). The cases thus continue to support Mr. Justice Rehnquist's observation in dissent in *Trimble, supra,* 430 U.S. at 781, that "the unanswered question remains as to the precise sort of scrutiny to which classifications based on illegitimacy will be subject."

In *Mathews* v. *Lucas* the Court concluded that the statutory classifications under consideration are permissible "because they are reasonably related to the likelihood of dependency at death" (427 U.S. at 509). The classifications here are permissible for the same reason, which this Court has repeatedly recognized as proper: they allocate the available resources of the trust fund among those categories of beneficiaries most likely to have suffered economically from the wage-earner's death, in a manner that will adequately replace the support they have lost.

As part of this allocation of the trust fund among many potentially deserving groups, Congress has determined that it is necessary to limit the total amount payable monthly to any one wage-earner's survivors.[21] Thus, each additional person who becomes eligible for benefits on the wage-earner's account, after that maximum is reached, receives his share by cutting the same pie into smaller slices. If, as here, eligible beneficaries live in different households, the addition of a new beneficiary in one household will lead to a reduction in benefits to the other. This may jeopardize the achievement of Congress' primary objective in providing the mother's benefit, because monthly payments to either household may become so low that *no* recipient has the option of staying home to care for the entitled children in her care.[22]

Setting the proper balance between the competing goals of assisting all those likely to have been dependent on the wage earner, providing benefits large enough to achieve the statutory purpose, and remaining within the fiscal limitations of the fund is peculiarly a legislative matter. As in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 516: "In the end, the precise accuracy of Congress' calculations is not a matter of specialized judicial competence; and [this Court has] no basis to question their detail beyond the evident consistency and substantiality." Appellees do not contend that the statutory classification is irrational—indeed, they concede (Motion to Dismiss or Affirm at 18-19) that illegitimate children are less likely than legitimate ones to have been supported by their fathers. *A fortiori*, the mothers of illegitimate children, the claimants directly affected by the marriage requirement, are less likely to have been supported than the wage-earner's wife or former wife. That should be the end of the matter.

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[21] The maximum amount available depends on the size of the wage-earner's "primary insurance amount," which in turn depends on the amount and duration of his earnings in covered employment. See 42 U.S.C. 415(a).

[22] This point may well be reached in this case if mother's benefits are paid to appellee Gonzales. Given Norman W. Boles' earnings record (Tr. 44), the maximum amount payable on his account since June 1978 has been $322.00 each month. Without the payment of benefits to appellee Gonzales, each of the secondary beneficiaries receives $80.50, making the total monthly payment $241.50 to the three members of Nancy Boles's household (one mother's benefit and two children's benefits) and $80.50 to Norman J. Boles. If Gonzales also must be paid out of this maximum, the total payments to each of the other beneficiaries will be reduced by 20%, so that Nancy Boles's household will receive $193.20 and the Gonzales household $128.80. Although the increase in income to the Gonzales household would hardly be enough to permit Gonzales to subsist without other sources of income, the decrease in the Boles household's income might well mean that Nancy Boles no longer could remain home to care for the two entitled children in her care .

Appellees argue, however, that the statute is unconstitutional not only because it excludes all illegitimate children and benefits all legitimate ones (an analysis we have shown above to be defective) but also because, unlike the children's benefit requirements considered in *Lucas*, the bar is absolute—there is no way that Gonzales can qualify for benefits by proving her dependence. This analysis is unpersuasive. Although it is true that the Court in *Lucas* found it significant that illegitimate children could qualify for benefits by proving their dependence (427 U.S. at 512),[23] this Court recognized in *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 772, that:

> benefits [under the Social Security Act] are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. * * * [A]ppellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.

Appellees' claim that this principle is inapplicable to classifications bearing on legitimacy is refuted by *Lalli* v. *Lalli*, *supra*, in which the Court upheld against an equal protection challenge a statute that absolutely barred an illegitimate child from inheriting from his natural father by intestate succession unless, during the father's lifetime, a court of competent jurisdiction had entered an order of filiation declaring his paternity. In the absence of such an order, the child was as certainly barred (after the father's death) from proving his entitlement as the child in *Trimble*, or as the child in *Jimenez* after his natural father's disability. The constitutional distinction between the statutes involved in *Lalli* and *Lucas* on the one hand, and *Trimble* and *Jimenez* on the other, is not whether the statutory bar is (or can become) insurmountable, but whether the affected class is irrationally broad in light of the statutory purposes. Given the necessity of balancing the competing legislative purposes we have discussed above, and the fact that Congress has recognized the needs of dependent illegitimate children in prescribing the eligibility provisions for children's benefits, Congress' determination that women who have at some time been married to the wage-earner are more likely to have been dependent on him than those who have not can scarcely be considered the sort of irrationally broad disqualification struck down in *Jimenez*, *Trimble*, and similar cases.[24]

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[23] In *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974), the Court similarly emphasized that the child denied benefits because of his illegitimacy was absolutely barred from proving his dependence after the wage-earner became disabled.

II

RETROACTIVE MONETARY RELIEF IS BARRED BY SOVEREIGN IMMUNITY

If the Court should disagree with our contention that the marriage requirement of 42 U.S.C. 402(g) is constitutional, it then would have to determine whether the district court was authorized to order the United States to pay mother's benefits to Gonzales retroactive to January 15, 1973, the date on which she filed her claim (J.S. App. 5a, 24a). For the reasons that follow, we submit that it was not.

This Court has held that monetary relief for past harms is not available against the United States unless Congress has determined that such relief is

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[24] Appellees also assert (Motion to Dismiss or Affirm at 12-13) that "[t]his Court now permits disparate treatment of illegitimates only in situations which involve the special considerations applicable to proof of paternity," citing *Lalli* and *Lucas*. Neither case suggests such an absolute rule. Although the primary justification for the special condition for inheritance by intestate sucession imposed on illegitimates in *Lalli* was the possibility of fraudulent claims, nothing in the plurality's opinion indicates that this is the *only* possible justification for distinguishing between illegitimate and legitimate children. *Lucas* refutes any such claim, since the classifications there were justified not on the basis of the need to prove paternity, but "because they are reasonably related to the likelihood of dependency at [the wage-earner's] death" (427 U.S. at 509). Indeed, the claimed denial of equal protection in *Lucas* related only to those children, like the appellee Lucas, whose "paternity was clear." *Id.* at 502.

appropriate, *i.e.*, unless Congress has waived the government's sovereign immunity. *United States* v. *Testan*, 424 U.S. 392 (1976).[25] The waiver must be clear and explicit.

Congress has not authorized the payment of money to Gonzales. To the contrary, Congress, by enacting the marriage requirement of Section 402(g), explicitly prohibited the payment of money to persons such as Gonzales who have never been married to the wage-earner on whose account they claim entitlement. If the Court should hold that Section 402(g) is unconstitutional, that would remove the prohibition, but it would not create a statutory authorization for retroactive payments. Such an award would be permissible only if some other provision of the statute authorized it.

There is no such provision. Like the Tucker Act provision reviewed in *Testan*, Section 205(g) of the

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[25] Appellees contend that a claim of sovereign immunity may be waived by the failure of the responsible government official to raise it in the answer to the complaint. But the requirement that *Congress* waive the government's sovereign immunity distinguishes this case from cases involving foreign sovereigns, and from the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, on which appellees rely (Motion to Dismiss or Affirm at 27). Congress has concluded that a foreign state implicitly waives its sovereign immunity by filing a responsive pleading, thus indicating its intent to subject itself to the domestic courts of this country. But the United States Attorney's responsibiliy for representing the federal government in its own courts does not similarly empower him to waive its sovereign immunity. That is a privilege reserved to Congress itself. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940), and cases there cited.

Social Security Act (42 U.S.C. 405(g)) merely gives district courts jurisdiction to hear certain cases; it does not create a substantive right to a monetary remedy whenever the government withholds benefits in accordance with a statutory provision later held unconstitutional. See *DeLao* v. *Califano*, 560 F.2d 1384, 1389-1391 (9th Cir. 1977); *Tatum* v. *Mathews*, 541 F.2d 161, 165-166 (6th Cir. 1976); *Johnson* v. *Mathews*, 539 F.2d 1111, 1122-1125 (8th Cir. 1976).

No other provision of the Social Security Act may " 'fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*United States* v. *Testan*, *supra*, 424 U.S. at 400).[26] It would be hard to argue that the Act, which in Section 402(g) explicitly conditions payments on marriage to the wage-earner, simultaneously authorizes payments to persons who do not meet this requirement. There is no provision stating that, if a portion of the statute prohibiting payment is declared invalid, then payment is deemed authorized.

The closest thing to such a provision is Section 204(a) of the Act, 42 U.S.C. 404(a), which directs the Secretary to make retroactive payments to persons wrongfully denied benefits to which they were statutorily entitled. There is a critical distinction, however, for purposes of Section 204(a), between administrative decisions that comported with basic statutory rules and decisions that violated the statute. If the Secretary should misinterpret or misapply the statute, Section 204(a) authorizes a court to order the Secretary to pay retroactive benefits. That judicial order carries out the statutory plan and corrects the Secretary's error. It requires the payment of benefits that Congress itself wanted to be paid. Here, however, the Secretary acted in accordance with Congress' plan; this case does not involve an order to the Secretary to pay benefits that Congress wanted to be paid. Appellees received the "correct amount of payment" within the meaning of Section 204(a), and no relief is required by that statute. In other words, Section 204(a) creates a remedy for an administrative violation of the statute but not for a deficiency in the statutory plan itself.[27] This Court has repeatedly stated that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). In light of this general principle, Section 204(a) should not be construed to authorize retroactive payments to persons to whom the statute explicitly denies benefits. Congress simply has not provided for retroactive payments under Section

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[26] The Due Process Clause itself is not a waiver of sovereign immunity. See *Duarte* v. *United States*, 532 F.2d 850, 852 (2d Cir. 1976).

[27] *Tatum* v. *Mathews*, *supra*, and *Johnson* v. *Mathews*, *supra*, held that Social Security claimants had been denied procedural due process in connection with the termination of their SSI benefits, but that only claimants found statutorily eligible for benefits could obtain retroactive relief under 42 U.S.C. 1383(b), the section analogous to Section 204(a).

204(a) where claimants cannot establish statutory eligibility for such payments. Cf. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (distinguishing between the award of an accrued monetary liability for past wrongs and prospective relief with monetary consequences); *Milliken* v. *Bradley*, 433 U.S. 267, 288-290 (1977) (same).

To be sure, this Court, without mentioning the sovereign immunity problem, has occasionally approved the payment of benefits as an accrued liability in the course of affirming decisions that had invalidated Social Security provisions on constitutional grounds. See, *e.g.*, *Califano* v. *Goldfarb*, *supra*, affirming 396 F. Supp. 308 (E.D.N.Y. 1975); *Weinberger* v. *Wiesenfeld*, *supra*, affirming 367 F. Supp. 981 (D. N.J. 1973). But because the problem was not briefed, and the cases do not discuss it, they do not preclude the Court from now holding that retroactive relief is impermissible. In recognizing the states' Eleventh Amendment immunity from retroactive monetary relief in *Edelman* v. *Jordan*, *supra*, the Court explicitly departed from four previous cases (including one decided after plenary consideration) that had approved such relief without explicitly considering the Eleventh Amendment problem (415 U.S. at 670-671).[28]

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[28] See also *Stone* v. *Powell*, 428 U.S. 465, 480-481 and nn. 14, 15 (1976); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

III

THE DISTRICT COURT LACKED AUTHORITY TO AWARD RELIEF TO A NATIONWIDE CLASS INCLUDING PERSONS WHO HAVE NOT FILED ANY CLAIM WITH THE SECRETARY

We have argued in *Califano* v. *Elliott*, cert. granted No. 77-1511 (Oct. 2, 1978), that district courts in social security cases may adjudicate only the claims of the named plaintiff and may not award injunctive relief to a nationwide class. The arguments we make at pages 54-76 of our brief in *Elliott* apply to this case as well, and we rely on them here.[29]

Appellees assert, however, that "[r]egardless of whether class relief is authorized in suits relying solely on 42 U.S.[C.] § 405(g) * * * jurisdiction as to the class herein exists under 28 U.S.C. § 1331, as a constitutional claim is asserted" (Motion to Dismiss or Affirm at 23). That is precisely the contention the Court rejected in *Salfi*, *supra*, 422 U.S. at 760-761, concluding: "the third sentence of [42 U.S.C.] 405 (h) precludes resort to federal-question jurisdiction for the adjudication of appellees' constitutional contentions."

Appellees nevertheless maintain that *Salfi* held only that Section 205(h) is the exclusive jurisdictional basis for actions challenging the denial of benefits, and that Section 205(h) does not preclude Section 1331 jurisdiction where the only relief claimed on behalf of the class is that the Secretray notify the class members that their failure to marry the wage-earner no longer rendered them ineligible for mother's benefits (Motion to Dismiss or Affirm 23-24). This contention not only is unsupported by the record but also is analytically unsound.

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[29] We have sent appellees a copy of our brief in *Elliott*.

The prayer for class relief in appellees' complaint (App. A, *infra*) tracked the one described in *Salfi*. Here, as there, appellees "sought declaratory relief against the challenged statute, and injunctive relief restraining appellants from denying mother's * * * benefits on the basis of the statute." 422 U.S. at 755. In addition, like the plaintiffs in *Salfi*, appellees here originally sought the payment of benefits to the class members. Only later did they change their prayer to a request that the district court require individual notice of eligibility to class members (App. B, *infra*).[30] The change of prayer is quite unimportant; under Fed. R. Civ. P. 54(c), a party may obtain any relief to which he is entitled. The pleadings do not shape the relief and thus do not affect jurisdiction. The pleadings did not limit the relief here. The entire class is the beneficiary of the declaratory judgment and injunction (J.S. App. 24a). The Secretary not only must notify the class of eligibility but must grant any claim for benefits. Any difference between an injunction to pay, on the one hand, and a notice requirement coupled with a declaratory judgment and injunction that cut off any defense to non-payment, on the other, is little more than a matter of form.

The plaintiffs in *Salfi* sought injunctive and declaratory relief substantially identical to the relief sought here, and the Court held that 28 U.S.C. 1331 did not grant jurisdiction. The fact that ~~applies~~ appellees ultimately sought only to require the Secretary to notify the class of eligibility does not make the case any less one involving a "claim arising under" Title II of the Social Security Act, 42 U.S.C. 405(h), since the class members' right to any relief turns on the interpretation of the Social Security Act as surely as did the class claim in *Salfi*.

Moreover, if Section 205(h) were read to allow Section 1331 jurisdiction of claims for "notice" relief, but to forbid jurisdiction of claims for other relief, the resulting pattern of judicial review would be odd indeed. The second sentence of Section 205(h), together with Section 205(g), bars all actions for review of nonfinal decisions of the Secretary. It is clear beyond debate that that sentence prohibits such actions from being brought under other statutory provisions: it expressly allows review of such actions only "as herein provided," *i.e.*, as provided by Section 205(g). Thus a claimant who has obtained an initial or interim adverse decision by the Secretary may not file suit until he has exhausted his administrative remedies; and once he has exhausted his remedies, review is available only under Section 205(g) and not otherwise. But under appellees' argument the federal district courts would have Section 1331 jurisdiction over suits brought by persons who have not filed a claim with, or obtained an initial decision from, the Secretary. In other words, appellees' argument resolves into the contention that Congress intended to permit class actions only with respect to claims concerning which there had been no findings of fact or decisions by the Secretary, *i.e.*, only with respect to the claims least ripe for judicial review. That anomalous result would advance no sound policy. There is no reason to conclude that Congress intended it.

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[30] The district court granted the declaratory and injunctive relief requested by appellees. Appellees correctly point out (Motion to Dismiss or Affirm at 22) that this particular class relief no longer will have any practical effect, for this Court's decision will control the Secretary's interpretation of Section 202(g)(1) as applied to all class members. The granting of this broad relief was, however, inappropriate for the reasons noted in our brief in *Elliott* at 75-76.

Appellees imply (Motion to Dismiss or Affirm at 24) that the individual notice requirement will not impose an onerous burden on the Secretary. This is incorrect. The computerized information concerning current recipients of children's benefits does not reflect whether the child is illegitimate. Thus, complying with the district court's order concerning notice to the children in the class would require manual review of the millions of files of beneficiaries of children's benefits. The files would not accurately disclose the adult members of the appellee class, since the illegitimate entitled child's file often does not reveal whether he is living with his mother.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed, Jun. 10, 1977, Dan W. Benedict, Clerk]

Civil Action No. A 77 CA 104

NORMAN J. BOLES, MARGARET GONZALES, on behalf of
themselves and all those similarly situated,
PLAINTIFFS

vs.

JOSEPH CALIFANO, Secretary, U.S. Department of
of Health, Education and Welfare, DEFENDANT

COMPLAINT

* * * * *

WHEREFORE, Plaintiffs, having no adequate remedy at law, respectfully pray that this Court;

A. Certify this matter as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. Enter a declaratory judgment that 42 U.S.C. Section 402(g)(1) is unconstitutional insofar as it prevents Plaintiffs and the Plaintiff class from receiving Mother's Insurance Benefits on the ground that Plaintiff mothers were never married to the fathers of their children;

C. Enter a permanent injunction restraining the Defendant from denying benefits to Plaintiff class on the basis of the invalid limitation;

D. Enter an order requiring the Defendant to make payment of Mother's Insurance Benefits to the named Plaintiffs and to all members of the class;

E. Enter an order regarding the payment of attorneys' fees and costs of suit;

F. Provide such other and further relief as shall be necessary and proper.

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APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-75-CA-171
and
Civil Action No. A-77-CA-104

NORMAN J. BOLES, MARGARET GONZALES, on behalf of themselves and all others similarly situated
PLAINTIFFS

v.

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare

MOTION TO AMEND PRAYER FOR RELIEF OF THE COMPLAINTS

Plaintiffs move to amend their complaints in both of the above cases, deleting from the prayer for relief paragraph D to the extent it seeks payment of Mother's Insurance Benefits to members of the plaintiff class, other than named plaintiffs and substituting therefore the following:

D. Enter an order requiring defendant to make payment of Mother's Insurance Benefits to the named plaintiffs Boles and Gonzales and requiring defendant to notify all members of the plaintiff class that they are no longer ineligible for Mother's Insurance Benefits solely because the mothers in the class were never married to the fathers of the children in the class, and advising members of the class of their right to apply for Mother's Insurance Benefits.

The amendments conform the pleadings to the decision of the Supreme Court in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975) which held that suits to require *payment* of Social Security benefits could only be brought after exhaustion of administrative remedies. Named plaintiffs have exhausted all administrative remedies, but many members of the plaintiff class have not done so, in large part because they have been advised by the Social Security Administration that they are not entitled to any Mother's Insurance Benefits. The purpose of the class relief sought is to advise potential applicants of their right to file for Mother's Insurance Benefits if the discrimination against illegitimate children is held unconstitutional herein.

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No. 78-808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES,
AND ALL OTHERS SIMILARLY SITUATED, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF APPELLEES

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No. 78-808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH,
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v.

NORMAN J. BOLES AND MARGARET GONZALES,
AND ALL OTHERS SIMILARLY SITUATED, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court is unreported and is set forth as Appendix B to the Jurisdictional Statement, J.S. App. 3a-28a.

QUESTIONS PRESENTED

1. Does Section 202(g) of the Social Security Act violate the equal protection component of the Due Process Clause by denying the protection of Mother's Benefits to all illegitimate children living with their mother, regardless of dependency, while granting the protection to all legitimate children identically situated?

2. Does the Social Security Act authorize the District Court to award retroactive benefits to the named plaintiffs when there has been an incorrect denial of benefits resulting from application of an unconstitutional condition on benefits?

3. Where the action did not seek recovery of Social Security benefits for members of the class, did the District Court have authority to award class relief limited in effect to a notice to class members of the removal of the unconstitutional marriage requirement?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 204(a) of the Social Security Act provides in pertinent part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) . . .
>
> (2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person . . .

[Other provisions are reproduced in Appellant's Brief at 2-5.]

STATEMENT

Mother's Insurance Benefits [hereinafter Mother's Benefits] are provided under Section 202(g) of the Social Security Act, 42 U.S.C. §402(g), to provide the surviving child of a deceased worker with the opportunity to receive the care of his or her surviving parent. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). However, the statute restricts Mother's Benefits to families in which the child is in the care of the surviving wife or surviving divorced wife of the father, the wage earner. This marriage requirement for the caretaker parent excludes from benefits all families containing illegitimate children living with their mothers, even if the father was living with and supporting the children and mother at the time of his death. All identically-situated families with legitimate children living with their mothers are eligible, regardless of actual dependency on the father.[1]

---

[1] All families must additionally meet the other requirements for Mother's Benefits, which are that the woman be not married, be not otherwise entitled to an equal or greater Social Security benefit, and have [Footnote continued on next page]

As the District Court found, all of the requirements for Mother's Benefits have been met by the named appellees, Margaret Gonzales and her son, Norman J. Boles, except that appellee Gonzales was never married to the deceased wage earner, Norman W. Boles. J.S. App. 5a-6a. Mr. Boles lived with appellee Gonzales from February 1963 until sometime in 1966. The offspring of their relationship is Norman J. Boles, born October 29, 1974. Norman J. Boles is receiving Child's Insurance Benefits [hereinafter Children's Benefits] under the Act, §202(d), 42 U.S.C. §402(d), and is in the care of his mother. He is the acknowledged child of the deceased wage earner.

After exhausting administrative remedies, appellees filed suit in the United States District Court for the Western District of Texas. The District Court held that the marriage requirement for Mother's Benefits unconstitutionally discriminates against illegitimate children.

[Footnote continued from preceding page] in her care a child of the wage earner entitled to Children's Benefits, 42 U.S.C. §402(g)(1)(A),(B),(C),(E). In the case of divorced wives, the child must be her own and that of the wage earner. 42 U.S.C. §402(g)(1)(F).

The District Court certified a class of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. §402(g)(1) restricts such benefits to women who were once married to the fathers of their children." J.S. App. 1a-2a. The District Court enjoined the Secretary from denying benefits to the class solely because of the marriage requirement. Payment of retroactive benefits was ordered only to the individual appellees. As to the class, the suit did not seek nor did the Court order payment of benefits.[2] The Court did order the Secretary to notify "all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits." J.S. App. 25a. To actually receive benefits, all class members would still have to apply for benefits and meet all other eligibility requirements.

---

[2] The complaint was amended to delete any request for payment of benefits to the class. The motion to amend is reprinted in Appellant's Brief, Appendix B, pp. 3a-4a.

SUMMARY OF ARGUMENT

I.

The statutory provision on Mother's Benefits, Section 202(g), discriminates against illegitimate children because Mother's Benefits are provided only to families in which the mother was married to the child's deceased father. All legitimate children living with their mothers receive the protection of Mother's Benefits, but all illegitimate children in the same circumstances are denied that protection without regard to whether the father was supporting the mother and child. The discrimination at issue here, based on a requirement of marriage of the parents, is precisely the type which this Court has declared unconstitutional in the last eleven years.

Section 202(g) is part of a legislative scheme which discriminates on the basis of illegitimacy. Congress once excluded illegitimates from Social Security benefits; now it provides some benefits but hedges them with a series of discriminatory provisions. That a miniscule fraction of illegitimate children - those living with their father's widow rather than their mothers - may receive the protection afforded by Mother's Benefits, does not save the constitutionality of the statute. Almost all illegitimate children live with their mothers and are denied benefits. This Court's holdings clearly demonstrate that discrimination against a subclass of illegitimates may be unconstitutional even though some illegitimates do not suffer from that discrimination. *See*, *e.g.*, *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164.

The standard for constitutional review of a classification based on illegitimacy is whether it bears a substantial relation to the governmental interest it was designed to serve. Lalli v. Lalli, No. 77-1115 (Dec. 11, 1978), plurality slip op. at 8. As the requirements for benefits and the legislative history make clear, the purpose behind Mother's Benefits is to provide children with the opportunity for the personal attention of the surviving mother by relieving to some extent the need for her to go to work outside the home. This Court so held in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636. Such purpose is not served by a marriage requirement which

denies benefits to all illegitimate children living with their mothers, regardless of actual dependency, and grants the benefits to all legitimate children similarly situated. Even if the father has no other dependents and was living with and supporting his illegitimate child and the child's mother every day of the child's life until the father's death, Mother's Benefits are unavailable to the family.

The absolute bar to a class of illegitimate children on benefits granted legitimate children is the clearest case of discrimination without any rational basis. The contrast between the two Social Security cases involving illegitimates in which this Court has written opinions illustrates the point. Contrast *Jimenez* v. *Weinberger*, 417 U.S. 628, with *Mathews* v. *Lucas*, 427 U.S. 495. Unlike *Jimenez* and this case, the disfavored class in *Lucas* had the opportunity to qualify for benefits by proving dependency. Thus a classification based on likelihood of support is invalid if it does not permit families with illegitimate children to prove support, while presuming support for others. It is unconstitutional if it totally bars benefits to illegitimates, many of whom have been supported by the deceased father.

Such an absolute bar is certainly not "carefully tuned to alternative considerations" as required by this Court. Mathews v. Lucas, 427 U.S. at 513.

II.

As the Secretary concedes, Section 204 (a) of the Social Security Act authorizes the courts to order the Secretary to pay retroactive benefits when a person has been paid "less than the correct amount." 42 U.S.C. § 404(a). The section contains no distinction between constitutional and statutory reasons for a payment that is less than correct. Moreover, the provision of the Act providing for judicial review of denial of payments, 42 U.S.C. § 405(g), treats constitutional and statutory claims alike. Weinberger v. Salfi 422 U.S. 749, 762 (1975). There is no reason to read into the authorization for an award of retroactive benefits an exception applicable to an applicant who meets every constitutionally valid eligibility requirement but has been denied benefits because of an unconstitutional eligibility requirement.

III.

The class relief awarded by the District Court was limited in effect to a notice to

all illegitimate children already receiving Children's Benefits and their mothers that they are no longer ineligible for Mother's Benefits solely by reason of the unconstitutional marriage requirement. The class relief does not require the payment of benefits but simply advises the class members that they may apply for benefits. Each class member will still have to demonstrate compliance with all valid eligibility requirements by filing a separate claim for benefits under the regular procedures of the Social Security Administration.

Notice to the class is necessary to prevent the continued loss of benefits to thousands of primarily low-income families who have previously been advised by the Social Security Administration that they are not eligible for Mother's Benefits. Without notice, these families will have no way of learning that they may now apply for benefits, and payment can be made only after an application has been filed. 42 U.S.C. § 402(g)(1)(D).

Since the District Court did not order the payment of benefits, Section 205(h) of the Act, 42 U.S.C. § 405(h), did not preclude the District Court's jurisdiction under 28 U.S.C. § 1331 to award relief limited to a notice. The limitations on the jurisdiction of the District Court imposed by Section 205(h) as interpreted in Weinberger v. Salfi, 422 U.S. 749, apply only to claims for benefits, i.e., to those claims where judicial review is available under Section 205(g), 42 U.S.C. § 405(g). Mathews v. Eldridge, 424 U.S. 319. The courts have not hesitated to find Sections 205(g) and (h) inapplicable or the exhaustion requirements waived where necessary to remedy a constitutional violation or prevent an inequitable forfeiture of benefits. See, e.g., Mathews v. Eldridge, supra; Wilson v. Edelman, 542 F.2d 1260 (7th Cir. 1976). These considerations prevail here. Affirmance by this Court on the merits will be a hollow victory for tens of thousands of families who will never learn of their right to benefits if notice to the class is not required of the Secretary.

If Section 1331 does not afford jurisdiction for notice to the class, then Section 205(g) of the Social Security Act must. The only reason that Section 1331 might not be available is that the request for the relief granted to the class constitutes a claim under the Social Security Act. Such claims are

reviewable under Section 205(g) if administrative remedies have been exhausted or exhaustion is not required. Under Mathews v. Eldridge, 424 U.S. 319, the only non-waivable requirement is the filing of a claim for benefits, and that has been met here by all members of the class. Since all families in the class are already receiving Children's Benefits, it is apparent that on the death of the father a claim for Social Security benefits was filed by each class member. That in some cases the application form used may have only referred to Children's Benefits and not Mother's Benefits is the responsibility of the Social Security Administration which advised the applicants that they were eligible only for Children's Benefits. As far as the applicants were concerned they claimed whatever benefits they were eligible for on the account of the deceased wage earner.

The remaining steps in the administrative process need not be exhausted. Exhaustion is waived where, as here, the Secretary concedes that there are no factual disputes and only a constitutional claim is presented. Mathews v. Diaz, 426 U.S. 67. In addition, exhaustion is unnecessary where there is no direct claim for benefits and the delay involved would cause irreparable harm. Such harm is apparent here, for without notice many members of the class will never learn of their rights and others will learn only after years of delay.

ARGUMENT

I

THE SOCIAL SECURITY ACT VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE BY DENYING THE PROTECTION OF MOTHER'S BENEFITS TO ALL ILLEGITIMATE CHILDREN LIVING WITH THEIR MOTHER, REGARDLESS OF DEPENDENCY, WHILE GRANTING THE PROTECTION TO ALL LEGITIMATE CHILDREN IDENTICALLY SITUATED

A. Section 202(g) Discriminates on the Basis of Illegitimacy

1. The marriage requirement of Section 202(g) constitutes discrimination on the basis of illegitimacy

Section 202(g) plainly draws a distinction on the basis of illegitimacy. By design and in fact, illegitimate children are denied benefits routinely available to legitimate children. Under the Act, Mother's Benefits are afforded to families in which the mother was married to the child's deceased father but not to families in which the parents were not married. The result is that all legitimate children living with their mothers receive the protection of Mother's Benefits, but all illegitimate children in the same circumstances are denied that protection. Indeed, even when the deceased father lived with his illegitimate child and the mother every day of the child's life until the father's death, the family is denied Mother's Benefits. In contrast, as the Court below noted, legitimate children receive the protection of Mother's Benefits even if their father deserted their mother before their birth and never supported them. J.S. App. 10a. The legislative message is clear: the only children who deserve the opportunity for the care of their mothers that Mother's Benefits afford are those who are legitimate. The classification of section 202(g) gives actual effect to this message.

Moreover, these disparate effects on illegitimate children, which result from the marital requirement of Section 202(g) limiting benefits to families headed by the wives and divorced wives of the deceased wage earner, cannot pass constitutional muster under a long line of Supreme Court cases. The discrimination at issue here, based on a marital requirement, is precisely the type which this Court has repeatedly declared unconstitutional in

the past eleven years.[3] This Court has also repeatedly emphasized that a marital requirement is the touchstone of unconstitutional discrimination against illegitimate children. In *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973), for example, the Court held that a statute that afforded children a judicially enforceable right of support against their fathers only if their parents were married

---

[3] This Court in a series of cases beginning with *Levy* v. *Louisiana*, 391 U.S. 68 (1968), has repeatedly struck down statutes denying benefits to a class of illegitimates and granting the same benefits to legitimates solely because of the failure of the parents to marry. Thirteen cases relating to disparate treatment of illegitimate children have been decided. The first eleven cases are collected in the twelfth, *Trimble* v. *Gordon*, 430 U.S. 762, 766 n. 11 (1977). The thirteenth case is the recent decision in *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978). Ten struck down the treatment as unconstitutional, and all ten involved total exclusion of a class of illegitimate children. One of the other three cases, *Labine* v. *Vincent*, 401 U.S. 532 (1971), has been effectively overruled by *Trimble* v. *Gordon*, 430 U.S. at 776 n.17. The two remaining decisions upholding disparate treatment of illegitimates involved procedural differences requiring illegitimate children to prove paternity or support, but did not result in the denial of benefits to those who could furnish the proof. *Lalli* v. *Lalli*, *supra*; *Mathews* v. *Lucas*, 427 U.S. 495 (1976). *See* discussion *infra* pp. 43-50.

"invidiously discriminate[s] against illegitimate children by denying them substantial benefits accorded children generally." Similarly, in New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 621 (1973), which involved a challenge to a state statute that granted public assistance only to families with children in which the adults were ceremonially married to each other, the Court upheld the argument that "...although the challenged classification turns upon the marital status of the parents as well as upon the parent-child relationship, in practical effect it operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate." Most recently, in Trimble v. Gordon, 430 U.S. 762, an Illinois inheritance statute was determined to be "constitutionally flawed because, by insisting upon not only an acknowledgement by the father, but also the marriage of the parents, it excluded 'at least some significant categories of illegitimate children....'" Lalli v. Lalli, No. 77-1115, plurality slip op. at 6, citing

Trimble, 430 U.S. at 771. Indeed, the fact that "...the marital status of the parents is irrelevant," was a basis for distinguishing Lalli from these prior cases, and for the Court's holding there that a requirement that the paternity of the father be declared in a judicial proceeding before his death does not invidiously discriminate against illegitimates. This Court's precedents thus make clear that the marriage requirement of Section 202(g) establishes a classification based on illegitimacy.[4]

2. Section 202(g) is part of a statutory scheme which discriminates on the basis of illegitimacy

The legislative history of the Social Security Act further reveals that Section 202(g) discriminates against illegitimates, and in fact is part of a set of provisions adopted by Congress which deny benefits to illegitimate children. As appellees discuss below, infra pp. 36-43, Mother's Benefits are designed to assist children by providing the means for the surviving parent to remain in the home to care for the child.

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[4] As the District Court fittingly dispensed with the argument that the classification is not based on illegitimacy:

> Under the defendant's [Secretary's] argument, all Illinois has to do is amend its statute to provide that intestate inheritance from the father

[Footnote continued on next page]

The Social Security Act first provided for Survivors' Benefits in 1939. Social Security Amendments of 1939, Pub. L. No. 76-379, §202, 53 Stat. 1360. Children of deceased or retired wage earners were included in the beneficiary groups, but illegitimate children were effectively excluded from eligibility for Children's Benefits by a statutory requirement that family relationships, including an individual's status as a "child" for purposes of Children's Benefits, were to be determined according to the law concerning the devolution of intestate personal property of the state in which the insured wage earner was domiciled. Because illegitimate children could not inherit their

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[Footnote continued from preceding page]
is granted only to a child "whose mother was married to his father" and the result in Trimble would be overturned. Illegitimate children would not inherit, but defendant would describe the result as constitutional because the statute was now facially neutral.
J.S. App. 23a.

father's intestate personal property under the law of virtually all states,[5] they were not "children" for purposes of eligibility for Children's Benefits.

The Social Security Board, which originally administered the insurance benefits under Title II, recognized as early as 1940 that these eligibility provisions created an inequitable situation for illegitimate children. In its first annual report after the Survivors' Benefits provision became effective, the Board stated:

> It was hoped that an interpretation of the conditions to be met in establishing a child's dependency under the amended act might be made which would obviate the necessity for consulting the law of the wage earner's domicile in determining the inheritance rights of illegitimate children. However, no legal authorization could be found for determining an illegitimate child's entitlement to benefits without applying the provisions of the act which make eligibility conditional upon the inheritance right of the child under State law.

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[5] See, e.g., J. Madden, Handbook of the Law of Persons and Domestic Relations, §105 (1931). Most states still maintained such restrictions when this Court decided Trimble v. Gordon, 430 U.S. 762.

Fifth Annual Report of the Social Security Board 41 (1940).

Despite repeated recommendations by the Social Security Board, see, e.g., Annual Reports of the Social Security Board, 1945, p. 41,and 1946, p. 463, it was not until 25 years later, in 1965, that Congress amended the Social Security Act to provide that an illegitimate child could receive Children's Benefits if the child was acknowledged in writing by the parent, was decreed by a court to be the insured wage earner's child, was the subject of a court order for support, or was otherwise shown to be living with or supported by the insured wage earner. Social Security Amendments of 1965, Pub. L. No. 89-97, §339, 79 Stat. 286. Even then, as an indication that Congress continued to attach a stigma to the lack of marriage of the parents, Section 202(d)(3) of the Act was also amended to provide that children whose parents had entered into an invalid ceremonial marriage would be deemed "legitimate" and thus relieved of any requirement to prove dependency for the purpose of eligibility for Children's Benefits.

Pub. L. No. 89-97, §339(b), 79 Stat. 286, codified at 42 U.S.C. §402(d)(3).

In addition, Congress in 1967 added a provision indicating that it continued to regard illegitimates as second class citizens. The Social Security Amendments of 1967 included an amendment to Section 203(a) of the Act,[6] which provides for the reduction of benefits when the total benefits on an account of a wage earner exceed the statutorily-imposed maximum. Prior to the amendment, reductions were applied on a pro rata basis to all recipients of benefits from a particular wage earner. The 1967 amendment required that such reductions would thereafter first be applied to reduce the benefits payable to illegitimate children, without any reduction of benefits for legitimate children or other recipients. Social Security Amendments of 1967, Pub. L. No. 90-248, §163(a)(1), 81 Stat. 821 (1968). Congress rejected an alternative provision introduced in the Senate, under which the benefits of other family members would simply not have been reduced if the family contained eligible illegitimate children, and opted for the House version, under which benefits for illegitimates would first be reduced and even eliminated.[7] S. Rep. No. 90-744, 90th Cong., 1st Sess. 94 (1967); Conference Report, H.R. Rep. No. 90-1030, 90th Cong., 1st Sess. 18-19 (1967).[8]

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[6] 42 U.S.C. §403(a).

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[7] This discriminatory treatment of illegimates is in marked contrast to Congressional action regarding maximum benefits when Congress added a different class of beneficiaries, divorced spouses, as recipients of Social Security benefits. In this latter case, Congress added a provision, still in effect, that no reduction of benefits shall occur if the maximum benefits on the account of a wage earner is exceeded solely due to entitlement to benefits on the part of a divorced spouse or surviving divorced spouse. Social Security Amendments of 1965, Pub. L. No. 89-97, §308(d)(6), 79 Stat. 286, codified at 42 U.S.C. §403(a)(3)(C).

[8] This Court in 1972 affirmed two decisions declaring that this provision unconstitutionally discriminated against illegitimate children. Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), aff'd mem., 409 U.S. 1069 (1972).

In sum, Congress evidenced a clear pattern of conditioning benefits for children upon their legitimacy. As the District Court correctly concluded, the history of the Act demonstrates that although Congress has now provided benefits to illegitimate children, those benefits have consistently been "hedged... with a series of discriminatory provisions...[t]he last vestige of [which] now appears to be before this Court." J.S. App. 24a.

3. The Secretary's arguments that Section 202(g) does not discriminate against illegitimate children are unconvincing

Against this clear demonstration of discrimination against illegitimates in both the statute's language and legislative history, the Secretary poses two arguments. First, although he concedes that "it is usually marriage that defines the difference between legitimacy and illegitimacy," Appellant's Brief at 13, he claims that the marriage requirement does not discriminate against illegitimate children because they theoretically may be cared for by their father's wife and Congress chose to give these widows "the option to remain home to care for the entitled child." *Id.* at 19. This argument, however, totally ignores the actual effect that the marriage requirement has on illegitimate but not legitimate children. It is beyond dispute that most children whose parents are not married live with their natural mothers, not their fathers' wives. Hence, for illegitimate children living with their mothers to obtain the opportunity for care offered by Mother's Benefits, they would have to leave the home of their natural mother and live with their father's wife, hardly a realistic option. Legitimate children living with their mothers are not faced with the necessity of such a drastic change in their living arrangements, for they are living with the woman who is also their father's wife. An argument that asserts that illegitimate children must leave the home of their mother to have the opportunity for "parental" care demonstrates that the marriage requirement excludes almost all illegitimate children from Mother's Benefits.

This Court has not hesitated to recognize the fact of discrimination against illegitimates in analogous circumstances. Thus, in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Court rejected an argument that unacknowledged illegitimates were not discriminated against because some of them could qualify for equal workers' compensation benefits if their father acknowledged them. The Court noted that "the acknowledgement so necessary to equal recovery rights may be unlikely to occur or legally impossible to effectuate[9] even where the illegitimate child may be nourished and loved." *Id.* at 174. In *Trimble* v. *Gordon*, 430 U.S. 762, this Court rejected an argument that the intestacy statute did not discriminate against illegitimates in inheritance because the father could always leave his property to his illegitimate children by will, 430 U.S. at 766. In New Jersey Welfare Rights Organization v. Cahill, the Court rejected an argument that strengthening family life justified limiting welfare benefits to husband-wife-child nuclear families when "in practical effect it operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate." 411 U.S. at 619-620. In that case, as here, a minuscule fraction of illegitimates could qualify for benefits, if they were living with their father and were adopted by his wife. The likelihood of that event is equal to the likelihood here that illegitimate children will leave their mother after the death of their father to live with his widow.

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[9] Under Louisiana law, a father could acknowledge his illegitimate child by following certain procedures. However, if the father was married at time of conception, acknowledgement was ineffective unless the father later legally married the child's mother. 406 U.S. at 167 n.3.

The Secretary's second argument is that this case does not involve discrimination against illegitimates because some illegitimate children, those living with their father's surviving wife instead of

with their mother, are eligible for the benefits, and some legitimate children, those living with foster parents instead of their mother, are ineligible. This argument equally ignores the effect of the marriage requirement. Only a tiny fraction of the illegitimate children of deceased workers live in families eligible for Mother's Benefits, for almost all such children live with their natural mothers.

More importantly, this Court has consistently held that discrimination against one subclass of illegitimates may be unconstitutional even though some illegitimates do not suffer from that discrimination. In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, this Court invalidated the Louisiana workers' compensation law that provided death benefits to both legitimate children and acknowledged illegitimate children but barred all benefits to unacknowledged illegitimates. One of the illegitimate children in Weber was born after the father's death and thus was never dependent on the father. But because posthumously born legitimate children received a full share of workers' compensation, this discrimination was also held unconstitutional, this Court stating that "...a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child..." 406 U.S. at 169 n.7. Weber thus illustrates that discrimination between even a class of only a small percentage of legitimate and illegitimate children similarly situated may be the basis for a constitutional violation.

Jimenez v. Weinberger, 417 U.S. 628 (1974), also illustrates this principle. The case involved Children's Benefits for children of disabled workers born after the onset of disability. All such legitimate children received benefits, as did illegitimate children who could inherit on intestacy from their father or whose illegitimacy resulted from a non-obvious defect in the parents' ceremonial marriage. Id. at 631 n.2. All other illegitimate children received no

benefits, regardless of whether they were living with or dependent upon their fathers. The classification was struck as unconstitutional discrimination based on illegitimacy. See also Davis v. Richardson, 342 F.Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069 (1972), and Griffin v. Richardson, 346 F.Supp. 1226 (D. Md.), aff'd mem., 409 U.S. 1069 (1972), discussed infra at 49-51. In these cases too, some illegitimate children were unaffected by discriminatory treatment. Indeed, this is true in all Social Security claims because under the Act an illegitimate is deemed legitimate if his parents had entered into a good faith but invalid marriage. See 42 U.S.C. §416(h)(2)(B). Thus, in Weber, Jimenez, Griffin and Davis, there were some illegitimate children receiving the benefits in question, but the effect on other illegitimate children was found to be sufficient to establish that the classifications at issue were based on illegitimacy.

In sum, the marriage requirement of Section 202(g) discriminates on the basis of illegitimacy. This discrimination is evidenced by the language of the statutory provision and its legislative history. Despite the Secretary's protestations, discrimination is also clear from the effect the statute has on illegitimate children living with their mothers. The District Court correctly concluded that the reality of the marriage requirement for Mother's Benefits is that it operates to exclude illegitimate children. J.S. App. 13a.

B. The Denial of Mother's Benefits to All Families of Illegitimate Children Living With Their Mothers Regardless of Actual Dependency When Benefits Are Afforded All Legitimate Children Similarly Situated Is Not Substantially Related to Any Legislative Purpose

1. The standard of review for the Section 202(g) classification is whether it bears a substantial relation to the governmental interest it was designed to serve

The Secretary properly concedes that "several of this Court's recent decisions suggest that in evaluating statutory classifications based on illegitimacy, a somewhat closer scrutiny than that traditionally

applied to laws regulating economic and social conditions may be appropriate." Appellant's Brief at 25. Nonetheless, the Secretary relies primarily on cases not involving illegitimacy at all. The distinction is of the essence. In the illegitimacy cases, this Court has made clear that although the strict scrutiny test is not applicable, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis for statutory differentiation. The result has been the articulation of an intermediate standard of review between strict scrutiny and the traditional rational basis standard for classifications based on illegitimacy.[10]

For example, in *Trimble* v. *Gordon*, 430 U.S. at 767, this Court stated that

> [d]espite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny,"

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[10] Classifications based on gender have been subjected to a similar intermediate standard. *See, e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).

> ...the scrutiny "is not a toothless one," [citing Mathews v. Lucas, 427 U.S. at 510], a proposition clearly demonstrated by our previous decisions in this area.

The Court then proceeded to make a detailed and careful analysis of the statutory purposes and whether they could be achieved without exclusion of illegitimate children.

The Court has followed this pattern of careful evaluation for the past eleven years,[11] as the opinion of the District Court demonstrates convincingly. See J.S. App. 20a-22a. Most illustrative is Jimenez v. Weinberger, 417 U.S. 628, in which discrimination against a class of illegitimates in Social Security benefits was held unconstitutional despite a strong argument that differential treatment was necessary to prevent spurious claims of paternity. In contrast to the decisions in cases not involving illegitimates,[12] Chief Justice

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[11] See cases cited note 3, supra.

[12] For example, in Social Security cases involving disparate treatment, general classifications not based on illegitimacy

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Burger's opinion for the Court closely examines the problem of spurious claims and finds they could be met without a blanket exclusion of a class of illegitimate children. Id. at 636.

Even in the cases in which the Court has upheld classifications related to illegitimacy, there is no question but that an intermediate standard of review between

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or gender have been upheld under a rational basis test. See, e.g., Califano v. Jobst, 434 U.S. 47, 53-54 (1977); Mathews v. De Castro, 429 U.S. 181, 185 (1976). The marriage rule at issue in Jobst was upheld because "general rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." 434 U.S. at 53. The rule at issue was therefore to be distinguished from those involving "merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group," id. at 54, citing Weinberger v. Wiesenfeld, 420 U.S. 636, involving sex discrimination, Jimenez v. Weinberger, 417 U.S. 628, involving discrimination against illegitimates, and Loving v. Virginia, 388 U.S. 1 (1967), involving racial discrimination.

strict scrutiny and rational basis has been applied, as, indeed, the Secretary concedes. Appellant's Brief at 26 n.20. See Lalli v. Lalli, plurality slip. op. at 5; Mathews v. Lucas, 427 U.S. at 513 (a statute "carefully tuned to alternative considerations.") In short, as this Court most recently articulated, the standard to be applied in illegitimacy cases is whether the statutory provision "bear[s] an evident and substantial relation to the particular [governmental] interests this statute is designed to serve." Lalli v. Lalli, plurality slip. op. at 8. The classification at issue in this case cannot meet this test.

2. Mother's Benefits are intended as benefits for the child and not as support for the deceased wage earner's spouse

The legislative history could not be more clear that the purpose behind Mother's Benefits is to provide children with the opportunity for the personal attention of their mother by relieving to some extent the need for her to go to work outside the home. Weinberger v. Wiesenfeld, 420 U.S.

636, 648-649. The Advisory Council which first recommended the adoption of Survivors' Benefits for children joined Children's and Mother's Benefits together as

> a program of survivors' insurance, intended primarily for the protection of the dependent orphans of deceased wage earners .... The council recommends that, in addition to benefits for such children, benefits be payable to widows who have in their care one or more of their children of the deceased wage earner. Such payments are intended as supplements to the orphans' benefits with the purpose of enabling the widow to remain at home and care for the children.

Final Report of the Advisory Council on Social Security 29, 31 (1938) (emphasis added).

At that time, Children's Benefits were limited to legitimate children, see discussion supra, pp. 20-21, so that Mother's Benefits at their inception were limited to widows and were even called "Widows' Current Benefits." This title was changed to Mother's Benefits in the 1950 amendment that provided Mother's Benefits to surviving divorced wives and their children. Social Security Amendments of 1950, Pub. L. No. 81-734, §104(a), 64 Stat. 477. The change in title also reflected the purpose of the provision, to provide for the care of children. A new Advisory Council in 1971 "reiterated this understanding", stating:

> Present law provides benefits for the mother of young... children...if she chooses to stay at home and care for the children instead of working. In the Council's judgment, it is desirable to allow a woman who is left with the children the choice of whether to stay at home to care for the children or to work.

1971 Advisory Council on Social Security, Reports on the Old-Age, Survivors, and Disability Insurance and Medicare Programs 30 (1970), quoted in Wiesenfeld, 420 U.S. at 649.[13]

Moreover, "[t]he whole structure of survivor's benefits conforms to this articulated purpose [care of children]," Weinberger v. Wiesenfeld, 420 U.S. at 650, but is inconsistent with the Secretary's contention that Mother's Benefits are designed to provide support for the wage-earner's spouse. First, the wife of a retired or deceased worker is not entitled to benefits under the Act until the wife reaches retirement age, despite the prospect of loss of support resulting from retirement or death of the husband. See 42 U.S.C. §§402(b)(1) and (e)(1). Congress expected the wife to support herself during her normal working life. Weinberger v. Wiesenfeld, 420 U.S. 636, 649-650. Wives and widows without children obtain

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[13] The fact that it is the mother and not the child that exercises the decision as to whether to accept Mother's Benefits and stay home to care for the child in no way detracts from the conclusion that the children, not the mother, are the intended

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beneficiaries of Mother's Benefits. It is of course the mother who decides what is best for her minor child. It is also the mother who decides how Children's Benefits are to be utilized--for food, housing, education, entertainment, etc. But the beneficiaries are nonetheless the children.

no benefits on the basis of their husband's earnings until they reach age 60, or in certain cases of disability, age 50. 42 U.S.C. §402(e)(1)(B). It is only when the care of children is present that benefits become available for the support of the mother of the children. *Id.* at 649-650. Moreover, Mother's Benefits cease when the child is no longer eligible for Children's Benefits or when the mother no longer has the child in her care or custody. 42 U.S.C. §402(g)(1)(E). Mother's Benefits also cease when the child reaches 18, although Children's Benefits may continue until age 22. 42 U.S.C. §402(s)(1). This statutory scheme led this Court in *Wiesenfeld* to conclude that:

> *This distinction also sustains our conclusion that §402(g) was intended only to provide an opportunity for children to receive the personal attention of one parent*, since mother's benefits are linked to children's benefits only so long as it is realistic to think that the children might need their parent at home.

420 U.S. at 651 n.17 (emphasis added).[14]

The provision of Mother's Benefits to surviving divorced wives further illustrates that Section 202(g) is not designed to provide support for the widow or divorced widow of the wage earner. In an earlier form, the statute provided Mother's Benefits only to surviving divorced wives who were receiving at least half their support from their former husband at the time of his death. Social Security Amendments of 1950, Pub. L. No. 81-734, §104(a), 64 Stat. 477. That requirement has been eliminated.[15] Although the legislative history of this change suggests that its intent was to ensure that surviving divorced widows received aid even when proof of dependency would be difficult because of nuances in state divorce and alimony laws, the effect of the amendment is that a divorced widow is eligible for Mother's Benefits even if she has never received any support for herself or her child from the father, indeed, even if the father was excused from any support obligations in the divorce proceedings. Such women and their children are eligible for Mother's Benefits, although no legal means by which support for the ex-wife may be obtained exists at the time of the death of the father.

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[14] Congress has similarly recognized elsewhere in the Social Security Act that an allowance of support for the mother is an integral part of benefits to a child. Originally, in the Aid to Families with Dependent Children program under Title IV of the Act, 42 U.S.C. § 601 *et seq.*, benefits were afforded only for the needs of the child and not the mother or other relative caring for the child. In 1950 Congress amended the statute to provide that the needs of the mother or other caretaker relative also be taken into account in computing benefits. This history is recounted in *Rodriguez* v. *Vowell*, 472 F.2d 622 (5th Cir.), *cert. denied* 412 U.S. 944 (1973), in which the court concluded that "the congressional purpose underlying the AFDC program was to assist dependent children by also meeting the needs of their caretaker relatives...." *Id.* at 625. The court noted, "[c]aring for a dependent child prevents the caretaker from working and, in the absence of other funds, the caretaker would be forced to share in the meager payments made to the child." *Id.*

For all these reasons, this Court in Wiesenfeld explicitly concluded that Mother's Benefits were intended as a benefit for the children. That conclusion was not, as the Secretary suggests, a mere oversight. An entire section of the opinion, Part III, Section B, some five pages, is devoted to the point and contains a detailed

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[15] Social Security Amendments of 1972, Pub. L. No. 92-603, §114(c), 86 Stat. 1348.

analysis of the statutory structure and legislative history. See 420 U.S. at 648-53. Its entire thrust is that Mother's Benefits were "intended only to provide an opportunity for the children to receive the personal attention of one parent since Mother's Benefits are linked to Children's Benefits only so long as it is realistic to think that the children might need their parent at home." Id. at 651 n.17. The ruling of the Court is aptly summed up in one sentence of Mr. Justice Rehnquist's concurring opinion:

> I believe the Court's examination [of the legislative history] convincingly demonstrates that the only purpose of §402(g) is to make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent, should that parent desire to remain in the home with the child.

420 U.S. at 655 (emphasis added).

3. Section 202(g) does not bear a substantial relation to the legislative purpose it was designed to serve

Given the statutory purpose of Section 202(g) to provide for the care of children, it makes no sense to exclude an entire class of children living with their natural caretakers, their mothers, simply because the mother was never married to the father. If Congress had any purpose other than to discriminate against illegitimate children, it did not seek to achieve that purpose by a provision "carefully tuned to alternative considerations."[16]

The absolute bar to benefits to all illegitimate children living with their mother, without regard to whether they and their mother were actually being supported by their father at his death, is the clearest case of discrimination without any rational basis, and places this case squarely within the line of cases holding such discrimination unconstitutional. The contrast between Jimenez v. Weinberger, 417 U.S. 628, and Trimble v. Gordon, 430 U.S. 762, on the one hand, and Mathews v. Lucas, 427 U.S. 495, and

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[16] Mathews v. Lucas, 427 U.S. at 513; see also Trimble v. Gordon, 430 U.S. at 772.

Lalli v. Lalli, No. 77-1115, illustrates the point. Both Jimenez and Trimble involved an absolute bar to Social Security benefits or intestate inheritance for children whose mothers had never married their fathers. In Lucas and Lalli, on the other hand, illegitimate children who established paternity or support in the manner prescribed by statute qualified for inheritance or Social Security benefits.[17]

Jimenez v. Weinberger involved the denial of Social Security benefits to certain illegitimate children of a disabled insured worker born after the onset of the disability. After-born legitimate children and certain classes of after-born illegitimate children received Children's Benefits, but other after-born illegitimate children were barred from benefits, regardless of whether they were living with or dependent on the insured. This

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[17] This demonstrates that the Secretary's contention, Appellant's Brief at 31, that Lalli involved an absolute bar to inheritance is factually incorrect and misstates the issue, which is whether the loss of benefits is related solely to the marital status of the parents, as here, or to some other factor.

Court found that the statute was both overinclusive by granting benefits to children not dependent on the insured and underinclusive by denying benefits to some illegitimate children who were actually dependent on the insured. It concluded:

> ...hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.

417 U.S. at 637.

The classification established by Section 202(g) is precisely the same because it results in a total exclusion of all illegitimates living with their mothers from Mother's Benefits and the inclusion of all identically situated legitimate children, regardless of dependency. The only difference between the two groups is the marriage of the parents, or lack thereof. It is precisely this absolute bar based on a marriage requirement that this Court found to be per se irrational and hence unconstitutional in Jimenez.

See also Trimble v. Gordon, 430 U.S. at 770-771, referring to the need "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity," and Lalli v. Lalli, plurality slip op. at 7.

In contrast, the requirement at issue in Mathews v. Lucas, 427 U.S. 495, that certain illegitimates prove dependency to receive Children's Benefits, involved only overinclusion, not underinclusion, because "any otherwise eligible child may qualify for survivorship benefits by showing contribution to support or cohabitation, at the time of death." Id. at 512. Unlike here, the disfavored class had the opportunity to qualify for benefits by proving dependency.[18]

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[18] The effect of the statutory provision involved in Lucas on illegitimate children has been greatly reduced by this Court's decision in Trimble v. Gordon, 430 U.S. 762, because statutes that bar all illegitimates from intestate inheritance are now unconstitutional. Illegitimate children now inherit on intestacy in such states and are therefore eligible for Children's Benefits without proof of dependency. See Mathews v. Lucas, 427 U.S. at 499.

Similarly, in Lalli v. Lalli, involving a requirement that a child's paternity be declared in judicial proceeding sometime before the father's death before the child could inherit through intestacy, there was no blanket exclusion of illegitimates. As this Court stated, "The marital status of the parents is irrelevant. The single requirement...is an evidentiary one." Plurality slip op. at 7. The requirement was then upheld as a reasonable method of avoiding spurious claims of paternity.

This case might be an entirely different one if Congress had merely created a presumption of dependency arising from legitimacy. It appears that Lucas and Lalli would allow Congress to grant Mother's Benefits to all legitimate children and their mothers without actual proof of dependency but require illegitimate children and their mothers to prove dependency. But Congress has gone further and created an absolute bar to receipt of benefits to all illegitimates living with their mother.

The Secretary, relying primarily on Lucas, argues throughout his brief that the marriage requirement creates a valid

classification because it relates to a likelihood of support of the widow by the father. But Lucas itself made clear that the likelihood of support was justified only to the extent of requiring proof of dependency by illegitimates but not by legitimates. This Court noted in Lucas that in its prior illegitimacy decisions "[u]nder all but one of the statutes, not only was the legitimate child automatically entitled to benefits, but an illegitimate child was denied benefits solely and finally on the basis of illegitimacy, and regardless of any demonstration of dependency or other legitimate factor". 427 U.S. at 511. The one exception referred to was Weber v. Aetna Casualty Surety Co., 406 U.S. 164, which along with Davis v. Richardson, 342 F.Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069, and Griffin v. Richardson, 346 F.Supp. 1226 (D. Md.), aff'd mem., 409 U.S. 1069, involved provisions of the Louisiana workers' compensation law and the Social Security Act which provided that if total benefits exceeded the maximum allowable, all benefits to illegitimate children would be reduced first, without any reduction for legitimates. These cases rejected the very same argument that the likelihood of support for legitimate children renders reduction of benefits only against illegitimates constitutionally permissible.[19]

Weber, Davis and Griffin also expressly reject the Secretary's contention that possible reduction in benefits to the legitimate

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[19] Similarly, Weinberger v. Wiesenfeld, 420 U.S. 636, involving gender, struck down discrimination in Social Security benefits even though it rested on the notion that "men are more likely than women to be the primary supporters of their spouses and children, [a notion] not entirely without empirical support." Id. at 644-45. In contrast, in Mathews v. De Castro, 429 U.S. 181, which did not involve sex discrimination but rather a classification distinguishing wives from divorced wives, this Court rested its decision on the fact that "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." Id. at 188. In sharp contrast to the situation here where the very purpose of the Mother's Benefits is to permit the mother to stay home and care for the child, this Court emphasized in De Castro that "a divorced wife need not forgo work in order to stay at home to care for her disabled [ex]husband." Id.

children because of the maximum benefits limit can justify denial of benefits to illegitimate children as a sort of rational rationing process designed to allocate limited resources to "those categories of beneficiaries most likely to have suffered economically from the wage earner's death." Appellant's Brief at 28. The very same argument was made by the Secretary to justify the statutory provisions in those cases which allocated limited resources for Survivors' Benefits first to legitimate children and secondarily to illegitimates. See, e.g., Griffin v. Richardson, 346 F.Supp. at 1226. These arguments were rejected by this Court in its summary affirmance of Davis and Griffin and by the statement in Weber that "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged." 406 U.S. at 169. That is why the opportunity to prove dependency has been stressed by this Court.

Furthermore, the absolute denial of the care made possible by Mother's Benefits to illegitimate children because of the marriage requirement applicable to their mother operates as a bar even if there are no other children of the father or any other person receiving Survivors' Benefits on his account. This illustrates that the marriage requirement was not intended to perform a "rationing" function, and in any event, operates in an overly broad, irrational manner.[20] It is a far cry from being "carefully tuned

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[20] The Secretary's suggestion that the size of the Mother's Benefit decreases as the number of entitled children increases, Appellant's Brief at 21, is inaccurate and misleading. As the example cited shows, *id.* at n. 22, Mother's Benefits, like all other benefits, are reduced proportionately only when the maximum benefit payable on the account of a wage earner is reached. The same reduction applies to Children's Benefits and was expressly held by this Court not to justify an exclusion of illegitimate children in *Davis* and *Griffin*. Moreover, the fact that Congress established a maximum which results in benefits that fall short of achieving the full statutory purpose of providing

to alternative considerations", as required by this Court. *Mathews* v. *Lucas*, 427 U.S. at 513.

(footnote continued from previous page:)

for children does not provide a constitutional basis for discrimination against illegitimate children. There is no permissible basis to require that even without an opportunity to show dependency, illegitimates must suffer more than legitimates. The same argument was rejected by *Weber*, *Davis* and *Griffin*.

II

THE SOCIAL SECURITY ACT AUTHORIZES THE DISTRICT COURT TO AWARD RETROACTIVE BENEFITS WHEN THERE HAS BEEN AN INCORRECT DENIAL OF BENEFITS, RESULTING FROM THE APPLICATION OF AN UNCONSTITUTIONAL CONDITION ON BENEFITS

Section 204(a) of the Social Security Act requires the payment of retroactive benefits to anyone who has received "less than the correct amount" of benefits by directing that "the Secretary shall make payment of the balance of the amount due such underpaid person." 42 U.S.C. §404(a). The Secretary concedes that this provision "authorizes a court to order the Secretary to pay retroactive benefits" in cases in which the Secretary has "misinterpreted" or "misapplied" the statute, but not in cases in which benefits have been incorrectly withheld because of the unconstitutionality of a statutory provision. Appellant's Brief at 35. In essence, his argument is that Section 204(a) constitutes a waiver of sovereign immunity for statutory

but not constitutional claims.[21] An examination of both the plain language of the statute and this Court's precedents establishes that this argument is wholly without merit.

The Secretary does not and cannot cite any decision holding that sovereign immunity precludes federal courts from granting recipients and applicants an opportunity to recover Social Security benefits denied pursuant to an unconstitutional statutory requirement. Indeed, numerous decisions approve such relief. *See*, *e.g.*, *Goldfarb* v. *Secretary of Health, Education and Welfare*, 396 F. Supp. 308, 309 (E.D. N.Y. 1975), *aff'd sub nom*. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Wiesenfeld* v. *Weinberger*, 367 F. Supp. 981, 991 (D. N.J. 1973), *aff'd*, 420 U.S. 636 (1975); *Griffin* v. *Richardson*, 346 F. Supp. 1226, 1237 (D. Md.), *aff'd mem.*, 409 U.S. 1069 (1972). *See also* *Jimenez* v.

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[21] This Court may decline to consider this argument since it was not raised in the Court below. *See* *Dothard* v. *Rowlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1917).

Weinberger, 523 F.2d 689, 704 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). These decisions reflect the statutory language of Section 204(a) which makes no distinction between constitutional and statutory reasons for a payment that is less than correct. The pertinent question is thus not, as the Secretary would have it, whether Congress intended plaintiffs to have Mother's Benefits. The question is whether Congress in authorizing suits to recover Social Security Benefits incorrectly withheld has excluded recovery of retroactive benefits when the error was reliance on an unconstitutional prerequisite for benefits. Such an exclusion would have to be implied, because there is nothing in Section 204(a) which even suggests such a result.

Moreover, the relationship between Sections 204(a) and 205(g) and (h), 42 U.S.C. §§405(g) and (h), demonstrates the intent of Congress to allow the district courts to award retroactive benefits whether the underpayment rests on a statutory error or the application of an unconstitutional condition on benefits. Sections 205(g) and (h) authorize suits in the district courts to review denials of claims by the Secretary.

This Court held in Weinberger v. Salfi, 422 U.S. 749 (1975) that "the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. Thus the plain words of the third sentence of §405(h)[22] do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act." Id. at 762 (emphasis added). In essence, the Social Security Act treats constitutional and statutory claims for benefits alike. There is simply no reason to read into Sections 204(a) and 205(g) and (h) an exclusion for retroactive benefits payable to an applicant who meets every constitutionally valid eligibility requirement for benefits but has been denied them because of unconstitutional eligibility requirements.[23]

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[22] 42 U.S.C. §405(g) provides for review of the final decision of the Secretary by a civil action filed "in the district court of the United States for the judicial district in which the plaintiff resides... ." The third sentence of Section 405(h) states:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

Indeed, the Secretary himself has interpreted the review scheme under the Social Security Act as authorizing full monetary relief, even in cases of denial of benefits due to an unconstitutional statutory condition. In *Norton* v. *Mathews*, 427 U.S. 524 (1976), the appellants claimed that they were denied Children's Benefits based on

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[23] The express provisions in Title II of the Social Security Act authorizing payment of retroactive benefits and suits to review denials of benefits distinguishes this case from *Edelman* v. *Jordan*, 415 U.S. 651 (1974), involving a different title of the Social Security Act providing for public assistance benefits, which title did not contain any explicit provision either for retroactive benefits or for judicial review of the denial or underpayment of benefits. 415 U.S. at 674. Moreover, *Edelman* involved special considerations of federalism, not applicable here, because the assertion of immunity was by a state under the Eleventh Amendment. *Jimenez* v. *Weinberger*, 523 F.2d 689, 704 n.33 (7th Cir. 1975), *cert. denied* 477 U.S. 912 (1976).

unconstitutional eligibility rules. In his brief in *Norton*, the Secretary, in arguing against the need for injunctive class relief ordering payment of benefits, stated that under the Act

> [i]f the claimant's contentions, *constitutional or otherwise*, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards). An order reversing the Secretary's decision and requiring payment of benefits is tantamount to the entry of a money judgment in the plaintiff's behalf and provides him with full compensation for his claim....

Brief for Appellee, *Norton* v. *Mathews*, at 21 (emphasis added). The Secretary made no distinction between prospective and retroactive benefits, nor could he, for relief requiring the payment of benefits does not provide a claimant with "full compensation for his claim" unless it includes the payment of retroactive benefits.

The Secretary relies on three cases involving claims for damages for denial of due process which, despite his characterization of them, are consistent with the claims in this case. *See De Lao* v. *Califano*, 560 F.2d 1384 (9th Cir. 1977); *Tatum* v. *Mathews*, 541 F.2d 161 (6th Cir. 1976); *Johnson* v. *Mathews*, 539 F.2d 1111 (8th Cir. 1976). In these cases, plaintiffs asserted a violation of due process in the termination of their Supplemental Security Income disability benefits without a prior hearing. The claim asserted and upheld was the denial of the hearing. With respect to retroactive benefits, the plaintiffs claimed that even those persons found ineligible after a hearing should receive benefits for the period between the original termination and the hearing. The courts, however, found that Congress had authorized retroactive payments only to those found eligible after a hearing and not to those found not eligible. *See De Lao* v. *Califano*, 560 F.2d at 1391; *Tatum* v. *Mathews*, 541 F.2d at 166 n.5; *Johnson* v. *Mathews*, 539 F.2d at 1125. The result in these three cases actually supports retroactive benefits here. In each of the three, all plaintiffs who established eligibility after a hearing were awarded full retroactive benefits

under the authority of §1631(b) of the Social Security Act, 42 U.S.C. §1383(b), the provision of the Supplemental Security Income title which is comparable to §204(a) of the Act. *De Lao*, 560 F.2d at 1389; *Tatum*, 541 F.2d at 166 n.5; *Johnson*, 539 F.2d at 1125. Similarly, in this case, appellees are eligible for Mother's Benefits, but for the marriage requirement.[24]

Equitable considerations also support an award of retroactive payments to appellees. In this case, and in virtually every instance in which Social Security benefits are unlawfully withheld, an award of retroactive payments restores the injured beneficiaries to the position they would have been in had the Secretary not violated the law, whether that law is the federal statute or the federal Constitution. The importance of such restitution should particularly not be overlooked here when all that is involved by way of monetary relief is a few thousand dollars,[25] an amount that is inconsequential to the government but of great value to the affected individuals.

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[24] Insofar as the decisions in *De Lao*, *Johnson* and *Mathews* denied retroactive benefits to those found not eligible on the grounds of sovereign immunity, appellees suggest those decisions were incorrect even though distinguishable.

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[25] Only the two named plaintiffs were awarded retroactive benefits by the District Court; the class relief was limited essentially to notice to class members that they may now be eligible for benefits. See discussion infra pp. 63-66.

III

WHERE THE ACTION DID NOT SEEK RECOVERY OF SOCIAL SECURITY BENEFITS FOR MEMBERS OF THE CLASS, THE DISTRICT COURT HAD AUTHORITY TO AWARD CLASS RELIEF WHICH IS LIMITED IN EFFECT TO A NOTICE TO CLASS MEMBERS OF THE REMOVAL OF THE UNCONSTITUTIONAL MARRIAGE REQUIREMENT

A. The Class and the Limited Nature of the Class Relief Awarded

The District Court certified this case "as a class action on behalf of a class consisting of all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. §402(g)(1) restricts such benefits to women who were once married to the fathers of their children." J.S. App. 1a-2a. The members of the class thus are all in the same position as the named appellees, Norman J. Boles and his mother, Margaret Gonzales.

Unlike the relief granted the named plaintiffs, however, the Court did not order the payment of any benefits to the named class. Indeed, the complaint was amended, in recognition of the limitations imposed by Weinberger v. Salfi, 422 U.S. 749 (1975), to delete any claim for benefits.

Rather the relief awarded the class was twofold: (1) declaratory and injunctive relief and (2) notice to the class of their potential eligibility for Mother's Benefits.

The District Court first declared Section 202(g)(1) unconstitutional and enjoined the Secretary "from denying benefits to Plaintiffs and the Plaintiff Class on the basis of the marriage requirement declared unconstitutional herein." J.S. App. 24a. The Secretary has agreed "that this particular class relief no longer will have any practical effect, for this Court's decision will control the Secretary's interpretation of Section 202(g)(1) as applied to all class members." Appellant's Brief at 38 n. 30. Accordingly, the only relief for the class which is in question here is the second category of relief, namely the notice to the class.

The District Court ordered that

> The Defendant [Secretary] notify all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits.

J.S. App. 25a.[26] The order is limited to notice to the class of their potential eligibility, a notice vital to prevent continued loss of benefits to tens of thousands of now-eligible families with illegitimate children. No payment of benefits is ordered. Indeed, the order recognizes that each claimant in the class will be required to apply for benefits and meet all the eligibility requirements save the marriage requirement. The assertion of the Secretary that he "not only must notify the class of eligibility but must grant any claim for benefits" and that "any defense to nonpayment" is "cut off," Appellant's Brief at 39, is palpably incorrect.

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[26] The District Court's order is practical in that it limits the notice to families already receiving Social Security benefits. It now appears that most of these families can be identified through the Social Security Administration's computers. As a result of an inquiry by counsel for appellees, the Secretary has undertaken an investigation to determine whether his brief (at 38 n. 30) was accurate in stating that the computers and tapes do not reflect whether recipients of Children's Benefits are illegitimate. The Solicitor General has now informed counsel for appellees that many of the illegitimate children receiving Child's Benefits can be identified by computer, and he will further advise the Court when filing his reply brief. In any event, notice to the class is appropriate even though not every member will actually receive it. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). There is no reason to deny this relief to most class members merely becuase the government's computer facilities are inadequate to identify every single class member.

The question of the practicalities of giving notice is, moreover, one for the District Court to consider in the first instance. It was never raised there by the Secretary and should not be considered for the first time on appeal. See Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975), and also cases cited, supra, n. 21. Indeed, the confusion on the part of the Secretary about the practicalities of compliance demonstrates the need for an evidentiary hearing as to any claim by him that the notice requirement is burdensome.

B. The Necessity for the Order

The District Court's order for notice to the class seeks to prevent the continued loss of benefits to primarily low-income families[27] who have previously been advised by the Social Security Administration that they are not eligible for Mother's Benefits. Without the notice ordered by the District Court they will have no way of learning that

they may no longer be ineligible and that they should apply for benefits. The Social Security Administration cannot pay benefits in the future to those families that have been unconstitutionally denied benefits in the past unless they apply, for the Act specifically requires the mother to apply as a condition of benefits. 42 U.S.C. §402(g)(1)(D).

An examination of the actual operation of the application process for Social Security benefits reveals the need for notice to the class. When the father of a child dies, the mother goes to the Social Security office to apply for "benefits." Although she, like the public, may know that one can obtain benefits when the father of a child dies, she, like most of the public, is not aware of the many kinds of benefits or the varying eligibility requirements. For those technical matters the applicant relies on the interviewer or other employee of the Social Security Administration.

When the interviewer learns that the mother had never been married to the father of the child, any consideration of Mother's Benefits is ended, for a statutory requirement cannot be met. It is not the function of the Social Security Administration to decide the constitutionality of the Act. See Weinberger v. Salfi, 422 U.S. at 764. The mother may never even be told of the existence of the Mother's Benefits. If she has heard of such benefits, or is told of them, she also is informed that she is ineligible. If she has any questions she can be shown the law or the summaries of the law used by the Social Security Administration, and can verify for herself that she is ineligible, for she clearly is not a "widow" or "surviving divorced mother." With rare exceptions, that is the end of the matter for the mothers in the plaintiff class. Many may feel very satisfied, for their child has been awarded Children's Benefits. None of the mothers may realize that they have been unconstitutionally denied Mother's Benefits.

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[27] As a result of the provision for reduction in benefits by reason of earnings from employment, see 42 U.S.C. §403(b), most members of the class with earnings over $9000 would not receive benefits.

Obviously few members of the class read legal literature. Rarely do mothers of illegitimate children seek legal advice as a result of denial of Mother's Benefits. Generally the denial seems to be correct on the face of it, and these mothers could hardly be expected to seek legal advice about constitutional challenges. Appellee Gonzales sought legal advice only because she believed

she was the common law wife of the deceased wage earner.[28] Counsel believes this case was the first ever brought to challenge the constitutionality of the marriage requirement for Mother's Benefits, and that only a handful of cases have been brought since the decision of the District Court herein. Yet there are in excess of 100,000 illegitimate children receiving Children's Benefits, according to an estimate received from the Social Security Administration.

In sum, the District Court's order of notice to the class was a simple, expedient way of ensuring that the unconstitutional denial of Mother's Benefits does not continue. Indeed, it is the only way that denial will end.

C. Jurisdiction to Require Notice to the Class is Afforded by 28 U.S.C. §1331

Because the claim of the plaintiff class arises under the Constitution of the United States, 28 U.S.C. §1331 grants jurisdiction to the District Court to hear the case. That jurisdiction has not been removed by Section 205(h) of the Social Security Act, 42 U.S.C. §405(h), as interpreted in

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[28] The contention was rejected by the Administrative Law Judge and thereafter abandoned by appellees.

Weinberger v. *Salfi*, 422 U.S. 749. As already noted, the District Court's relief as to the class is limited to a notice. Section 205(h) applies only to claims for benefits.

Section 205(h) provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

The Court has described *Salfi* as holding that this section "precludes federal-question jurisdiction in an action challenging denial of claimed benefits." *Mathews* v. *Eldridge*, 424 U.S. 319, 327. This limitation is required by the express language of the last sentence of 205(h), which refers to actions "to recover on any claim arising under this subchapter." The claim referred to means a claim for Social Security benefits, which is what "this subchapter" of the Social Security Act is all about. *Salfi*, 422 U.S. at 762.

Section 205(h) is the corollary to Section 205(g), 42 U.S.C. §405(g), and only bars actions which can reach the courts under the review provisions of subsection (g). Section 205(g) provides for judicial review in the district courts of "any final decision of the Secretary made after a hearing." The second and third sentences of Section 205(h) bar review of the Secretary's findings of fact and decisions "except as herein provided," *i.e.*, in 205(g), and bar actions under Section 1331 to recover "on any claim arising under this subchapter." The hearing and final decision referred to in Sections 205(g) and (h) are those provided in the case of claims for Social Security benefits. In *Mathews* v. *Eldridge* this court noted that "[a]s construed in *Salfi*, §405(g) requires only that there be a 'final decision' by the Secretary *with respect to the claim of entitlement to benefits.*" 424 U.S. at 329. No person could file a "claim" under the Social Security Act asserting that the Secretary should give notice to the class of the end of the unconstitutional marriage requirement or obtain an administrative hearing on such a request or judicial review under Section 205(g). But for that very reason, and because the relief granted the plaintiff class is not a "claim" under the Social Security Act, it is also not barred by Section 205(h).

The Secretary seeks to gloss over what he concedes -- that "appellees ultimately sought only to require the Secretary to notify the class of eligibility," Appellant's Brief at 39 -- by focusing on the complaint as originally filed. Id. But plaintiffs amended the complaint to remove any claim for benefits for the class. See Appellant's Brief, App. at 3a-3b. More importantly, what is determinative of the District Court's jurisdiction here is not what the plaintiff said in a pleading but the relief actually awarded; that relief was limited to notice. The relief granted is of the essence, for this Court emphasized in Salfi that "[a]ppellees sought, and the District Court granted, a judgment directing the Secretary to pay Social Security benefits." 422 U.S. at 761 (emphasis added). That is simply not this case.

It is also incorrect to assert, as the Secretary has, that allowing jurisdiction to afford the limited relief necessary in the

special circumstance here to prevent a forfeiture of benefits will create "odd" patterns of judicial review. Appellant's Brief at 39-40. Upholding the District Court's jurisdiction under Section 1331 to fashion a notice remedy will not allow persons who have not filed a claim with, or obtained a decision from, the Secretary to litigate the validity of the Social Security Act. One who has not been denied benefits by the Secretary solely on the grounds that are alleged to be unconstitutional could not properly represent a class of individuals who have been denied benefits solely on constitutional grounds, for it might be speculative as to whether the named plaintiff would ever benefit from a favorable ruling. See Fed. R. Civ. P. 23(a)(3 and 4) and (b)(2).

Salfi should not be given an overly broad application to bar the relief afforded the class here. As the opinion makes clear, the decision rests on the specific language of Section 205(h) and the result is contrary to the general rule that administrative remedies need not be exhausted when exhaustion would be futile. 422 U.S. at 757-62. The unusual restrictive language of Section 205(h) should be limited to the claims for benefits to which Congress intended it to apply.

This Court and the lower federal courts have not hesitated to either waive the exhaustion requirements of Section 205(g) or to find that they were inapplicable when a rigid application of Salfi would have prevented effective relief, particularly when constitutional claims are involved. The exhaustion requirement has been deemed waived when there was a great interest in prompt resolution of the plaintiff's constitutional claim because further delays would cause irreparable harm due to a continued denial of benefits. Mathews v. Eldridge, 424 U.S. 319 (1976). See also Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Mattern v. Mathews, 582 F.2d 248 (3d Cir. 1978).

Based on the decision in Mathews v. Diaz, 426 U.S. 67 (1976), finding a waiver of exhaustion, the courts have also held that no further exhaustion was required because the Secretary had the opportunity to determine that the only remaining issue with regard to all the class members was the constitutionality of a statutory eligibility rule. Jimenez v. Weinberger, 523 F.2d 689 (7th Cir.

1975), cert. denied, 427 U.S. 912 (1976); Wilson v. Edelman, 542 F.2d 1260 (7th Cir. 1976). The requirement has also been waived based on a finding that the Secretary made a determination with regard to the named plaintiff which was applicable to all similar cases, and thus it would be a waste of judicial and administrative resources to require multiple exhaustion of remedies. Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977). Finally, some courts have simply found that the requirements of Section 205(g) were inapplicable. In these cases, the courts have held that the third sentence of Section 205(h) does not bar mandamus jurisdiction over a procedural claim, either under the statute or the Constitution, which is "collateral" to the claim for entitlement to benefits. Barnett v. Califano, 580 F.2d 28 (2d Cir. 1978); Elliot v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), cert. granted, No. 77-1511 (Oct. 2, 1978); White v. Mathews, 559 F.2d 852 (2d Cir. 1977); Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975).

All of these cases reflect a concern that an overly broad application of Salfi will result in the federal courts' unavailability for the redress of constitutional rights. They look to the reality of the situation and conclude that the jurisdiction of the federal courts is needed to provide class relief to prevent injustices which would otherwise occur. That very situation is now before this Court. If this Court affirms on the merits, the victory will be a hollow one for the tens of thousands of families in the plaintiff class who will not learn of the decision or even receive the benefits which they need and to which they are entitled by law, unless the Secretary is required to give them notice. It was, after all, the Secretary who informed them in the first instance that they were ineligible. He should be required to correct that error.

D. Injunctive Class Relief May be Afforded Under Section 205(g) of the Social Security Act if Unavailable Under 28 U.S.C. §1331

The Secretary has asserted that injunctive relief is not authorized for the class in cases brought under Section 205(g) by incorporating herein his brief in *Califano v. Elliot*, *cert. granted*, No. 77-1511. Since that case has already been argued, appellees similarly refer the court to the argument

of respondents in their brief in the *Elliot* case on this point, pp. 69-74, adding only that at least five courts of appeals have approved class action injunctive relief under Section 205(g).[29] The Secretary does not cite, and counsel for appellees have not found, any contrary decisions in the courts of appeals.

If 28 U.S.C. §1331 does not provide jurisdiction for the limited class relief awarded by the District Court, then such relief is authorized by Section 205(g) of the Social Security Act, 42 U.S.C. §405(g). The only reason that Section 1331 jurisdiction might not be available would be that the relief granted the class was a claim under the Social Security Act. Such claims are reviewable in the district courts under Section 205(g) if administrative remedies have been exhausted or exhaustion is not required. *Mathews v. Eldridge*, 424 U.S. 319. These requirements have been met here.

In *Mathews v. Eldridge* this Court held that the exhaustion requirement of Section 205(g) "consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived'.... The non-waivable element is the requirement that a claim for benefits shall have been presented to the Secretary." 424 U.S. at 328. Exhaustion of the remainder of the administrative process may be waived by the Secretary. Id.

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[29] *Jones v. Califano*, 576 F.2d 12 (2d Cir. 1978); *Elliot v. Weinberger*, 564 F.2d 1219, (9th Cir. 1977), *cert. granted*, **No**. 77-1511 (Oct. 2, 1978); *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333 (3d Cir. 1977); *Johnson v. Mathews*, 539 F.2d 1111 (8th Cir. 1976); *Jimenez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

The class relief awarded by the District Court requires notice only to "all illegitimate children receiving Child's Insurance Benefits and their mothers." J.S. App. 25a. As demonstrated above, this means that all members of the plaintiff class have in fact filed a claim for Mother's Benefits. As noted, the reality of the application process is that each member of the class sought whatever benefits were available on the death of the father. Those claims actually filed included Mother's Benefits, or would have were it not for the unconstitutional marriage requirement. All class members completed an application form for Children's Benefits and some undoubtedly filled out an application for Mother's Benefits, as appellee Gonzales did here. Others filled out a form only for

Children's Benefits because employees of the Social Security Administration either did not advise claimants of the existence of Mother's Benefits or advised them of their ineligibility, in effect denying the application. See supra, pp. 67-68. Thus each member of the class met the requirement of having filed a claim for Social Security benefits arising from the account of the deceased father.

The remaining steps in the administrative process (the waivable portion) need not be exhausted for the District Court to exercise jurisdiction. This Court's decisions in Mathews v. Diaz, 426 U.S. 67, and Mathews v. Eldridge, 424 U.S. 319, illustrate the two categories of circumstances in which the requirement of exhaustion has been deemed waived, both of which apply here.

First, Diaz holds that exhaustion is waived when the Secretary concedes that there are no factual disputes and only a constitutional issue is presented, the situation here. In Diaz, not even the named plaintiffs in the class action had completely exhausted available avenues for administrative review, but the Secretary conceded that as to two named claimants there were no disputed issues of fact and their applications should be treated as final for the purposes of the litigation. 426 U.S. at 72-73. As to another claimant, the Secretary did not make this concession but acknowledged that his claim could not be allowed under the statute as the sole remaining issue was constitutional. "As in Salfi, th[e] constitutional question is beyond the Secretary's competence." Id. at 76. This Court found that these stipulations by the Secretary constituted a waiver of the exhaustion requirement. Id. at 77.

The situation is similar here for there are no disputed issues of fact and the sole issue is a constitutional one. The Secretary necessarily had to deny the claims of all other class members because they had not met the marriage requirement. Here, as in Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977), although there has not been exhaustion by each class member of every step of the administrative process, the Secretary has "taken a final position in one of them...at the highest administrative level, on a legal issue common to all class members." Id. at 344. The Third Circuit added that "[r]equiring multiple exhaustion on the same issue would involve the same 'commitment of administrative resources unsupported by any administrative or judicial interest' that Justice Rehnquist so aptly condemned in Salfi." Id. at 345. Similarly, in Wilson v. Edelman, 542 F.2d 1260 (7th Cir. 1976), the court held that by filing a motion for summary judgment (as the Secretary did here), "the [Secretary] necessarily contended that there were no material issues of fact in dispute." Id. at 1272. Acknowledging Salfi's concern for safeguarding against judicial review of unnecessary constitutional issues, id. at 1273, the court nevertheless found that when the Secretary acknowledges that the only issue is a constitutional one beyond the power of the Secretary to determine, Salfi is not a bar to a suit. It concluded that "Salfi did not...intend to permit the Secretary to object to Section 405(g)'s exhaustion requirement purely for the purpose of defeating jurisdiction." Id. So too, here, the Secretary's assertion of Salfi as a bar is solely to prevent the District Court from requiring notice to the class, for there are no issues which the Secretary himself could determine relating to that notice. On the contrary, the notice will provide the opportunity for adjudication of claims by the Secretary by advising the members of the class of their right to file claims for benefits.

Second, Mathews v. Eldridge, 424 U.S. 319, holds that exhaustion is unnecessary when the delay involved would cause irreparable harm and there is no direct claim for benefits. Failure to grant notice to the plaintiff class here causes irreparable harm because some class members will never learn of their right to benefits and others will learn of it only after years of delay. There is no occasion for Social Security recipients to visit a Social Security office once benefits have begun. The members of the plaintiff class receive their checks for Children's Benefits in the mail. Only a personal notice will advise them of their right to apply for Mother's Benefits.[30]

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[30] In the analogous situation of welfare benefits, this Court upheld as constitutional the determination of the lower courts that a notice of possible eligibility for benefits improperly withheld is appropriate. Quern v. Jordan, No. 77-841 (Mar. 5, 1979).

As in Jimenez v. Weinberger, 523 F.2d 689, 694, cert. denied, 427 U.S. 912, the District Court properly recognized the necessity for notice to the class.

E. The Certification of a Nationwide Class Was Within the Discretion of The District Court and Should Not Be Disturbed Here

The District Court's determination that a notice should be given to all potential claimants who had been unconstitutionally denied Mother's Benefits was within the discretion of the District Court and should not be disturbed. Bermudez v. United States Department of Agriculture, 490 F.2d 718 (D.C. Cir.), cert. denied, 414 U.S. 1104 (1973). In similar cases the courts have certified a nationwide class in order to prevent a loss of benefits. See, e.g., Bermudez v. United States Department of Agriculture, supra; Elliot v. Weinberger, 564 F.2d 1219 (9th Cir.), cert. granted, No. 77-1511 (Oct. 2, 1978); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir.), cert. denied, 427 U.S. 912.

The arguments advanced by the Secretary against a nationwide class in his brief in Elliot v. Califano, No. 77-1511, pp. 75-76, have no applicability to this case in which the merits of the dispute are before this Court for determination. The Secretary did not raise any objection to the nationwide scope of the class in the District Court. The Secretary now argues that certification of a nationwide class forecloses the opportunity for debate in the lower courts. But whatever validity such an argument might have had in the District Court is lost once the District Court has decided this case on the merits and the issue is before this Court. The decision here will settle the merits on a nationwide scale.

If this Court affirms on the merits, a nationwide class is necessary to provide all newly eligible members of the class with notice that they may now apply for Mother's Benefits. Such relief is necessary to realize in practice the objective of Rule 23(b)(2), Fed. R. Civ. P., equal treatment of parties similarly situated.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 78-808

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND
ALL OTHERS SIMILARLY SITUATED

*ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS*

REPLY BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

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A. Appellees argue as if the statute at issue here provided: "Mothers of legitimate children shall receive money for the children's benefit, but mothers of illegitimate children shall not." But the statute does not read that way. The benefits are intended to give an option to the mothers; the children receive support indirectly whether the mother chooses to remain at home (thus receiving benefits) or to work (thus earning income). We have elaborated on this point at pages 17-22 of our opening brief. We emphasize here that there is a lack of congruity between the legitimacy of the child in question and the availability of indirect assistance through living with someone who receives mother's benefits.

At least the following categories of legitimate children receive no indirect support from mother's benefits:

1. Children living with their mothers who have remarried after the wage earners' deaths.
2. Children whose mothers have died.
3. Children whose mothers are alive and unmarried, if the children live with relatives, in foster homes, or in the homes of persons who adopted them.
4. Children living with persons with whom the wage earners lived but whom the wage earners did not marry. (For example, suppose that a wage earner and his wife have two legitimate children. The wife dies or is divorced from the wage earner, and the wage earner and his children begin living with a woman whom he does not marry. If the wage earner then dies, the woman with whom he was living at the time of his death will not receive mother's benefits even if she continues to care for the two children.)
5. Children illegitimate at birth but legitimated by operation of the law and living with their unmarried mothers.

On the other hand, at least the following categories of illegitimate children will receive some (indirect) assistance from mother's benefits:

1. Children living with the deceased wage earner's spouse. (This could be similar to example (4) above; if the wage earner first lived with one woman and then married another, all children in the care of the spouse would receive any indirect assistance that mother's benefits offer.)

2. Children whose parents married after their illegitimate birth, but who were not thereby legitimated under state law.
3. Children whose mothers are "deemed" married by operation of 42 U.S.C. 416(h)(1).

The statute simply does not draw its distinctions on the ground of the child's legitimacy. There is a vivid illustration of this. If appellee Norman J. Boles went to live with the wage earner's wife, and if both of the wage earner's legitimate children began living with appellee Gonzales, absolutely nothing would happen to the payment of mother's benefits. Mrs. Boles still would receive mother's benefits, and Gonzales still would receive none. And, of course, all the children would continue to receive their own benefits. It is hard to understand how a statute that operates in this way can be declared invalid on the ground that it discriminates against illegitimate children.[1]

If the statute has any effect at all on illegitimates, the effect is no more than incidental to its purpose of assisting spouses of wage earners. Such an incidental effect is not purposeful discrimination, and it cannot be held unconstitutional. See *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-268 (1977).[2]

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[1] A further example is the child drawing benefits on his grandfather's wage record (see 42 U.S.C. 416(e)). Such a child, whether legitimate or not, receives no indirect support from mother's benefits if he is in the care of his mother, but does if he is in the care of his grandmother.

[2] We have discussed the importance of purpose and effect in similar cases at pages 21-32 of the brief for the United States as amicus curiae in *Personnel Administrator of Massachusetts* v. *Feeney*, No. 78-233, argued Feb. 26, 1979. We have furnished a copy of that brief to counsel for appellees.

Indeed, because the statute itself does not make any significant event turn on the legitimacy of the child living with the person who applies for mother's benefits, the injunction entered in this case makes appellees and their class better off because of illegitimacy. Under the order entered by the district court, the legitimate children discussed in categories (1) to (5) above still would not receive any indirect assistance from mother's benefits. If appellee Norman J. Boles were to become legitimate by operation of state law, appellee Gonzales would lose the entitlement to benefits created by the order. If Gonzales were to take the wage earner's legitimate children into her care, and Norman J. Boles were to begin living with the wage earner's spouse, Gonzales would lose her entitlement. Surely there is something strange about a rule of constitutional law that compels Congress to give additional benefits to persons such as Gonzales because the children in their care are illegitimate rather than legitimate.

B. Our opening brief stated (Br. 38 n.30) that it was not likely to be possible to establish with any ease who should be notified under the district court's order. Further inquiry concerning the feasibility of using HEW's computers to identify current recipients of children's benefits who are illegitimate discloses that certain categories of illegitimate children[3] may have been identified as early as 1965 by special coding when awards were entered into the computers. However, a large category of entitled illegitimate children (those entitled under 42 U.S.C. 416(h)(3) because they were acknowledged by the wage earner, living with him, or supported by him at his death) may not have been identified by similar coding prior to 1971. Since obsolete operational manuals detailing the procedures used by the various units responsible for the entry of the coding are, in many cases, unavailable, it is extremely difficult to ascertain precisely what information was recorded years ago, and to establish when it began to be recorded. In sum, the point made in note 30 of our brief remains valid: it would not be a simple matter to notify the class members. Although some information concerning the legitimacy of current recipients of children's benefits is available, it is incomplete to a degree that we have not been able to determine. At a minimum, it does not include information for some early recipients processed before the computer system's inception in 1963. We agree with appellees, however, that if this Court should reject our contentions on the merits and also should conclude that class relief was authorized, it would be appropriate for the district court to conduct an evidentiary hearing to determine the extent to which the class can be notified.

For these reasons, as well as those discussed in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

April 1979

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[3] *I.e.*, those entitled to inherit under state law (42 U.S.C. 416(h)(2)).